TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 265

THE UNITED STATES OF AMERICA, PETITIONER

vs.

RAY KEITH ATKINSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

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[Caption omitted.]

1 In United States District Court, Western District of Texas, El Paso Division

No. 1632—At Law

Ray Keith Atkinson, plaintiff

vs.

United States of America, defendant

Plaintiff's first amended original petition

Filed May 2, 1934

To the Honorable Judge of Said Court:

Comes now herein, Ray Keith Atkinson, plaintiff in the above styled and numbered cause, and complaining of The United States of America, defendant, and with leave of the Court first had and obtained, files this, his First Amended Original Petition, in lieu of his Original Petition filed herein, and would respectfully show unto the Court:

1. That plaintiff is a bona fide resident of the City and County of El Paso, Texas, in said Western District.

2. That plaintiff, on or about September 30, 1918, enlisted and was inducted into the military services of the defendant and served therein until on or about the 26th day of December 1918, when he was honorably discharged from said military forces of the defendant.

3. That while in the active military service of the defendant the plaintiff applied to the defendant for a certificate of War Risk Insurance in the sum of $10,000.00 in accordance with the statutes and laws of the United States of America applicable thereto; and that pursuant to said application the defendant issued to plaintiff its War Risk Insurance policy or certificate in the sum of $10,000.00, the number of which the plaintiff at this time does not know, which

2 said certificate of War Risk Insurance provided that in the event of the death or total and permanent disability of plaintiff while said insurance was in full force and effect that said sum of $10,000.00 would become due and payable in monthly installments of $57.50 each.

4. That from and after the time of the issuance of said certificate of War Risk Insurance, the exact rate of which is at this time unknown to the plaintiff, and to July 1, 1927, said policy of insurance was in full force and effect, and that the premiums thereon for each and every month from the date of issuance to July 1, 1927, had been deducted by the defendant from the pay owing by it to the plaintiff, or had been paid by the plaintiff; that on or about the first day of July 1927, upon application by the plaintiff, theretofore made to

the defendant in the manner and form required by the defendant, said policy or certificate of War Risk Insurance was converted into a Five Year Term Convertable Policy of Government Life Insurance, said Five Year Term Convertable Policy being No. K-634242; that on or about June 1, 1932, said policy No. K-634242 of Five Year Term Convertible Insurance was converted, renewed, and extended into what is known as a Five Year Level Premium Term Insurance, in the manner and form requi'ed by the defendant, and in accordance with the laws, statutes, and regulations of the defendant applicable thereto; that said policy No. K-634242 was likewise in the sum of $10,000.00, and such insurance in the sum of $10,000.00 was continued in and by virtue of the Five Year Level Premium Term Insurance; that all premiums falling due and said insurance in the sum of $10,000.00 have been paid and accepted by the defendant up to and including the month of May 1934, and said insurance in the sum of $10,000.00 was on July 1, 1927, in full force and effect, and has been kept in full force and effect at all times since said date, and by the provision and terms of said policy the same has become and is now incontestable.

3 5. That said Five Year Term Convertible Insurance Policy No. K-634242 provided that in the event of the plaintiff becoming totally and permanently disabled, while the same was in full force and effect, that said insurance would become due and payable by the defendant to the plaintiff at the total and permanent disability, and plaintiff says that said rate of $57.50 per month from and after the date of such Five Year Level Premium Insurance Policy is conditioned in a like manner.

6. That said policy specially provides, in Paragraph 11, Section A, as follows:

"Without prejudice to any other cause of disability . . . the loss of hearing of both ears . . . shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest."

7. And plaintiff further says that on January 1st, 1928, he was suffering from a condition, or disease, or diseases of his ears, to wit, Otitis Media Nerve Deafness, or chronic catarrhal Otitis Media, or Otosclerosis, one, some, or all, and in any event plaintiff was suffering from some disease or diseases of the ears which resulted in the loss of hearing in both his ears, and as a result of said disease or diseases and said condition of his ears, he was, on said January 1st, 1928, totally and permanently disabled within the purview of said Paragraph 11, Section A of said policy, above set out, and in any event plaintiff alleges that he was at said time, by reason of the condition of his ears, and the loss of hearing therein, totally and permanently disabled within the purview of said policy, and of the laws and statutes of

The United States of America, in this, to wit, that at said time he was suffering from an impairment of body which rendered him unable to follow continuously a substantially gainful occupation, and
4 at said time it was reasonably certain that such total disability would continue throughout the remainder of his life, and that in any event plaintiff says that he became so totally and permanently disabled at sometime prior to the filing of his claim for benefits under said insurance on or about December 10, 1932, and that he became so permanently and totally disabled while his said insurance was in full force and effect, and that upon the happening of said contingency of total and permanent disability said insurance became due and payable, and the defendant became indebted to the plaintiff on said insurance at the rate of $57.50 per month for each and every month from and after the date of such total and permanent disability.

8. Plaintiff further says that for the period commencing July 1, 1927, and ending on or about July 1, 1932, he paid to the defendant the sum of $7.20 for each and every month, as premiums on said insurance, and that beginning on or about the 1st day of July 1932 the plaintiff has paid to the defendant the sum of $7.70 for each and every month thereafter, as premiums on said insurance; and plaintiff says that the defendant is indebted to him for each and every such premium so paid by the plaintiff from and after the date of his said total and permanent disability.

9. Plaintiff would further show that on or about December 7, 1932, he made application to the defendant for the payment of his said insurance, from and after the date of his total and permanent disability, and that such application was made in the manner and form required by law; that on or about the 14th day of February 1933, the defendant, acting by and through its duly authorized agent and servants, and under the direction of same, disallowed, refused, and denied plaintiff's application for said insurance, and that on or about the 18th day of February 1933, the defendant notified the plaintiff by letter that his application had been denied, whereupon there existed a disagreement between the plaintiff and the defendant, as contemplated by Section 19 of the World War Veterans' Act of 1924, as amended.

10. That the defendant has in its possession and under its control a record of all the premiums paid on said insurance by the plaintiff, together with the insurance policies herein mentioned, together
5 with the original application made by plaintiff to the defendant for the policy of Five Year Convertible Term Insurance issued about July 1, 1927, as well as plaintiff's original, applicable for said Five Year Level Premium Term Insurance, together with plaintiff's original application for insurance benefits made by the plaintiff to the defendant on or about December 7, 1932, and the plaintiff here, now, serves notice on the defendant to produce all of the same at the trial of this cause or secondary evidence will be resorted to by the plaintiff in the proof of all of the same.

Wherefore, premises considered, plaintiff, Ray Keith Atkinson, prays the Court that the defendant, United States of America, be required to answer herein, in accordance with the statutes and laws of the United States, and that on trial hereof, the plaintiff have judgment against the deefndant, adjudging that the plaintiff is now and has been since the 1st day of January 1928, totally and permanently disabled, within the purview of the law and the policy herein sued upon, and that plaintiff have and recover judgment against the defendant for such insurance payments at the rate of $57.50 per month, from and after the date of his said total and permanent disability, and in any event plaintiff prays for judgment adjudging the date of his said total and permanent disability, and adjudging that he have and recover from the defendant for such insurance the sum of $57.50 per month, from and after the date of such total and permanent disability, and plaintiff prays for judgment against the defendant for premiums on said insurance paid by plaintiff to the defendant from and after the date of such total and permanent disability, and plaintiff prays that the judgment of the Court provide for payment, by separate voucher, to John M. Worrell and R. A. D. Morton, his attorneys of record, of 10% of any recovery allowed herein, and that such judgment provide for payment to said attorneys of 10% of any future installments paid to the plaintiff by and under such judgment.

JOHN M. WORRELL and R. A. D. MORTON,
Attorneys for Plaintiff.

6 [*Duly sworn to by Ray K. Atkinson; jurat omitted in printing.*]

In United States District Court

Defendant's first amended original answer

Filed May 2, 1934

To the Honorable Judge of Said Court:

Now comes the defendant, the United States of America, and leave of the Court first had and obtained, files this, its first amended original answer in reply to plaintiff's first amended original answer in reply to plaintiff's first amended original petition herein, and would show:

I. Defendant demurs generally to plaintiff's said petition and says that same is insufficient in law to require this defendant to answer further herein.

7 Wherefore defendant, the United States of America, prays judgment of the Court.

II. Defendant especially excepts to plaintiff's said petition and particularly to that portion of the seventh numbered paragraph thereof, wherein it is alleged that in any event plaintiff became totally and permanently disabled at some time prior to the filing of his amended petition herein, and as to said allegation defendant says that same is

insufficient because it appears otherwise from plaintiff's petition, particularly in paragraph nine thereof, that the claim sued upon was filed with the defendant on or about December 7, 1932, and said claim was denied on or about February 14, 1933, and defendant says that it appears affirmatively from plaintiff's said petition that as to any contingency maturing the policy subsequent to the claim sued upon, there is not and cannot be a disagreement, as required by law.

Wherefore, defendant prays judgment upon the foregoing special exception, with the matter especially excepted to be stricken from said pleading.

III. Now comes the United States of America, defendant in the above styled and numbered cause, and denies all and singular the allegations in plaintiff's said petition contained, and of this it puts itself upon the country.

WALTER S. HOWE,
Assistant United States Attorney.
DAVID A. TURNER,
Attorney, Department of Justice.

8 In United States District Court

Trial amendment of defendant's first amended original answer

Filed May 2, 1934

To the Honorable Judge of Said Court:

Now comes the defendant, the United States of America, and leave of the Court first had and obtained, files this, its trial amendment to its first amended original answer herein and would show:

I. Defendant, the United States of America, without waiving its demurrer and general denial herein, but still insisting upon the same, would respectfully show the Court, as an alternative defense, that the plaintiff herein applied for war-risk insurance in the sum of $10,000.00 on October 6, 1918, and paid the premium thereon to and including the month of November 1918; that no premiums were thereafter paid until on June 10, 1921, the plaintiff executed an application for reinstatement of his said war-risk insurance by the execution of Form 742, pursuant to which the said policy of war-risk insurance was reinstated, effective July 1, 1921; that thereafter premiums were paid on said reinstated policy of war-risk insurance to include the month of May 1927 and effective June 1, 1927, pursuant to an application for conversion, the said war-risk insurance in the amount of $10,000.00 was converted to the Five-Year Convertible Term Policy, which is the contract upon which plaintiff's cause of action is based; that plaintiff would not have been entitled to the conversion effective June 1, 1927, unless he then had in effect a policy or contract of war-risk insurance, or unless he had first reinstated his war-risk insurance contract, providing the same had lapsed; that at the time the

9 plaintiff executed his application for reinstatement of his said war-risk insurance on June 10, 1921, he stated on his said application that he had not been examined or treated by a physician since the lapse of his insurance, and further stated that he had no disease or defect of the ear. Defendant would show that said representation as to examination and treatment and as to his physical condition were false misrepresentations of material facts in this case in that said plaintiff had consulted physicians subsequent to the lapse of his original contract of war-risk insurance and had been examined and treated by said physicians, who, defendant alleges, are Dr. Hyde and Dr. Grove, both of South Dakota; that plaintiff was not, in fact, free of disease or defect of his ear, but was then suffering with a disease or deft of his ear, which affected his hearing; that he consulted said physicians for the purpose of examination and treatment of his ear condition; that at the time of his application for reinstatement on June 5, 1921, plaintiff had a disease or defect of his ears, which impaired his hearing, and that he was not then in sound physical condition; that said disease or defect is of the same nature as the disease or defect which plaintiff relies upon for recovery herein; that said misrepresentations were material and were relied upon by defendant, and that said reinstatement contract would not have been issued and put into effect but for the material misrepresentations of the plaintiff; that said misrepresentations were made with the intent to deceive defendant and procure the issuance of said reinstated contract of insurance. Defendant would further show that on or about May 21, 1927, plaintiff herein executed an application for conversion of his said reinstated contract of war-risk insurance to a Five-Year Convertible Term (Government Life) policy, in the sum of $10,000.00. That said application consisted of a form designated as Form 739, revised January 1927, styled "Application for Conversion to United States Government Life Insurance", which was signed by plaintiff herein on said date, and that said application contained therein
10 the following question and answer: "Are you now disabled on account of injury or disease? No;" that said representation was false, fraudulent, and material in that plaintiff did then have a material impairment of the sense of hearing of the same kind and character which he now has and upon which he relies for recovery herein. That said statement was made with the intent to deceive and defraud defendant and procure the issuance of said converted policy, which constitutes the basis of this suit.

Wherefore, defendant says that by reason of said false and fraudulent representations of material facts, as hereinabove stated, defendant was led to issue said reinstated contract of war-risk insurance and said converted policy of Government Life insurance, and but for said misrepresentations said policies would not have been issued and that said policies are, therefore, of no force and effect, and plaintiff is not entitled to recover herein, and defendant prays the Court that judgment herein entered for defendant, for its costs, and for

such other and further relief, general and special, as defendant may be entitled to in the premises.

WALTER S. HOWE,
Assistant United States Attorney.
DAVID A. TURNER,
Attorney, Department of Justice.

In United States District Court

Verdict of the jury

Filed May 3, 1934

We, the jury, find for the plaintiff who became permanently and totally disabled December 1st, 1932.

S. E. STRETTON, *Foreman*

11 In United States District Court

Judgment

Filed May 7, 1934

Be it remembered that on the 2nd day of May, 1934, the above-styled and numbered cause came on regularly for trial, and all parties thereto having announced ready, and a jury of twelve good and lawful men, to wit, S. E. Stretton and eleven other, having been duly impanelled and sworn to try said cause, and the parties hereto having read their pleadings to the jury, and the said cause having continued in trial to the 3rd day of May, A. D. 1934, on which date the evidence of both parties having been concluded, and the argument of counsel having been made, and the jury having been charged by the Court, the said jury retired to consider of its verdict, and having considered of the same, thereupon, on the said 3rd day of May 1934 returned into Court the following verdict to wit: "We, the jury, find for the plaintiff, who became permanently and totally disabled December 1st, 1932. (Signed) S. E. Stretton, Foreman", which verdict was thereupon received by the Court and ordered filed by the Clerk;

And it appearing to the Court that the parties hereto, acting by and through their respective attorneys of record, have stipulated and agreed that in the event that the jury returned herein a verdict for the plaintiff that the Court should find and fix the date of due proof by the plaintiff of total and permanent disability;

And it further appearing to the Court that the plaintiff's said insurance was in full force and effect on December 1st, 1932, upon which date the jury has found plaintiff to have been totally and permanently disabled;

12 And it further appearing to the Court that the evidence in said cause shows that the plaintiff filed his application for insurance benefits under and by virtue of his policy of insurance on December 10th, 1932;

It is therefore adjudged and decreed by the court that the policy of insurance sued upon herein was in full force and effect on December 1st, 1932, and that the plaintiff, Ray Keith Atkinson, became totally and permanently disabled on December 1st, 1932, within the purview of his said policy of insurance, and of the laws and statutes of The United States of America applicable thereto and that said plaintiff Ray Keith Atkinson made due proof to the proper authorities of the defendant of his said total and permanent disability on December 10th, 1932;

It is further ordered, adjudged, and decreed by the Court that the plaintiff, Ray Keith Atkinson, do have and recover from the defendant, The United States of America, on his said policy of insurance, sued upon herein, the sum of $1,035.00, being the sum of $57.50 per month from and after December 1st, 1932, the date of plaintiff's total and permanent disability, to and including the month of May 1934, making a total of 18 months, and further that said plaintiff have and recover against said defendant the sum of $130.90, being the amount of monthly premiums paid by the plaintiff to the defendant from and after December 1st, 1932, the date of plaintiff's said total and permanent disability, making a total of $1,165.90, including such insurance payments and such premium payments;

It is the further order of the Court that 10% of said sum of $1,165.90, or the sum of $116.59, be paid by separate voucher
13 to John M. Worrell and R. A. D. Morton, the attorneys of record for said plaintiff, Ray Keith Atkinson, and that the balance of said sum be paid by separate voucher to the plaintiff, Ray Keith Atkinson.

It is further ordered by the Court that 10% of any future installments paid to the plaintiff, Ray Keith Atkinson, hereunder, and by virtue hereof, be paid by separate voucher to the said John M. Worrell and R. A. D. Morton, plaintiff's attorneys of record.

It is the further order of the Court that the Clerk of this Court do certify to the proper disbursing officer of the defendant, and the proper officer of The United States Veterans' Administration, a certified copy of this decree for observance and performance.

Done, at El Paso, Texas, this 7th day of May, A. D. 1934.

CHARLES A. BOYNTON,
United States District Judge.

O. K. as to form.

DAVID A. TURNER,
Attorney, Department of Justice.
WALTER S. HOWE,
Assistant United States Attorney.

In United States District Court

Motion for order extending time to file defendant's bill of exception

Filed June 8, 1934

To the Honorable Judge of this Court:

Now comes the United States of America, defendant in the above entitled and numbered cause, by W. S. Hunnicutt, Esquire, an Assistant United States Attorney for the Western District of Texas, and moves the Court for an order granting defendant an extension of time in which to file a Bill of Exception herein, for the following reasons, to wit:

That defendant's Attorney General and Veterans' Administration have not completed a review of the records in this case and such review cannot now be terminated in time to prepare and file defendant's Bill of Exceptions within the time required by the rules of this Court.

Wherefore, defendant, the United States of America, prays that an order be entered by this Court extending the time for filing defendant's Bill of Exceptions for a period of fifty-three days, from June 15th until August 7th, 1934.

WALTER S. HUNNICUTT,
Assistant United States Attorney.

In United States District Court

Order extending time to file defendant's bill of exceptions

Filed June 8, 1934

On this day came on regularly to be heard and considered by the Court the motion of the defendant herein, the United States of America, alleging that there now remains insufficient time in which to complete a review of the records in this case and to prepare and file a Bill of Exceptions on behalf of the defendant, and praying for an extension of time for such purpose, and the Court being of the opinion that defendant's motion should be granted, it is therefore, upon motion of the United States Attorney for the District, ordered, adjudged and decreed that the time for filing such Bill of Exceptions be extended for a period of fifty-three days, from June 15th until August 7th, 1934.

Ordered at El Paso, Texas, this 8th day of June, A. D. 1934.

CHARLES A. BOYNTON,
United States District Judge.

Plaintiff will not oppose the motion for the extension as set out in above motion.

JOHN M. WORRELL,
Attorney for Plaintiff.

In United States District Court

Bill of exceptions

Filed August 7, 1934

Be it remembered, That on this Wednesday, May 2nd, 1934, the above-entitled and numbered cause came on for trial before the Honorable Charles A. Boynton, a United States District Judge in and for the Western District of Texas, at El Paso, Texas, and continued from day to day to its conclusion; during the trial of which cause the following facts were adduced in evidence, objections made, and exceptions reserved by the parties.

Plaintiff being represented by John M. Worrell, Esq., and R. A. D. Morton, Esq., of El Paso, Texas; and defendant being represented by David A. Turner, Esq., Attorney Department of Justice, and Walter S. Howe, Esq., Assistant U. S. Attorney.

A jury was duly selected, empanelled, and sworn.

Whereupon the pleadings were read and the following proceedings were had:

The witnesses were thereupon called and were sworn by the Clerk.

RAY KEITH ATKINSON, Plaintiff, having been duly sworn, testified as follows:

16 On direct examination: My name is Ray Keith Atkinson and I am the plaintiff in this case.

I enlisted in the forces of the United States during the war. At that time I applied for War Risk Insurance, and a certificate of War Risk Insurance was issued to me at that time. That is it.

COUNCIL FOR PLAINTIFF. I want to introduce the War Risk Insurance Policy.

COUNCIL FOR DEFENDANT. No objection, Your Honor, except that we would like for the record to show that is not the policy involved in this suit; constitutes merely the basis.

THE COURT. It is my understanding that was converted into a different policy later on. Very well, if there is no objection.

Whereupon said policy was received in evidence, Marked "Plf's. Ex. 1", and is in words and figures as follows, to wit:

EXHIBIT 1

THE UNITED STATES OF AMERICA,
TREASURY DEPARTMENT.
BUREAU OF WAR RISK INSURANCE.
Washington, D. C.

Certificate No. 4110844. Date insurance effective, Oct. 6, 1918.

This certifies That Ray Keith Atkinson has applied for insurance in the amount of $10,000, payable incase of death or total permanent disability in monthly installments of $57.50.

Subject to the payment of the premiums required, this insurance is granted under the authority of an Act amending "An Act en-
17 titled 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department', approved September 2, 1914, and for other purposes", approved October 6, 1917, and subject in all respects to the provisions of such Act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance and the terms and conditions published under authority of the Act, shall constitute the contract.

W. G. McADOO,
Secretary of the Treasury.
WILLIAM C. DE LANOY,
Director of the Bureau of War Risk Insurance.

Countersigned at Washington, D. C.
(Signed) G. CRANE, *Registrar.*

Form 711: On the reverse side appear the following:

IMPORTANT NOTICE: The insured may change the beneficiary without the consent of such beneficiary. This insurance is not assignable and is not subject to the claims of the creditors of the insured or of the beneficiaries.

Should a claim arise under this certificate you are requested to write direct to the Bureau of War Risk Insurance, Treasury Department, Washington, D. C., in order to secure a prompt settlement. There will be no expenses in connection with proving a claim and collecting the amount due, other than small fees to notaries. It will not be necessary to consult or employ an attorney, claim agent, or other person to secure benefits under this certificate.

Stamp reading: "Filed May 2, 1932 (El Paso Division). D. H. Hart, Clerk, U. S. District Court, West Dist. of Texas. By (Signed) Flora L. Linker, Deputy Clerk."

Q. Do you remember the date of your enlistment?
A. The latter part of September 1928.
18 Q. Do you remember the date of your discharge?
A. The last day of December 1928, or approximately that—yes; that is it.

COUNSEL FOR DEFENDANT. He means 1918 instead of 1928.

Q. The date of your discharge?
A. December 26th, 1928, would be the date of the discharge.
Q. Do you mean 1918?
A. I mean 1918; I beg pardon.

THE COURT. The date of the enlistment, also.

Q. What was the date of your enlistment?
A. September 30th, 1918.

COUNSEL FOR PLAINTIFF. I introduce that [referring to discharge].

COUNSEL FOR DEFENDANT. Do I understand counsel for the plaintiff is offering the discharge in evidence?

COUNSEL FOR PLAINTIFF. Yes.

COUNSEL FOR DEFENDANT. For what purpose is it being offered?

COUNSEL FOR PLAINTIFF. Simply to show the date of his enlistment and the date of the discharge.

COUNSEL FOR DEFENDANT. There will be no objection.

Whereupon said discharge was received in evidence marked "Plf's Ex. 2", and is in words and figures as follows, to wit:

EXHIBIT 2

HONORABLE DISCHARGE FROM THE ARMY OF THE UNITED STATES

13124

To all whom it may concern:

This is to certify, That Ray Keith Atkinson, No. 3780179, Private Medical Department United States Army, as a testimonial of honest and faithful service, is hereby honorably discharged from the military service of the United States by reason of Hon. Discharged to resume studies in Bacteriology per. Auth. Ar. 77 W. D. 1918.

19

Said Ray Keith Atkinson was born in Wilmont, in the State of South Dakota.

When enlisted he was 22 $\frac{8}{12}$ years of age and by occupation a student.

He had brown eyes, dark brown hair, fair complexion, and was 5 feet 8 inches in height.

Given under my hand at Camp Greenleaf, Georgia, this twenty-sixth day of December, one thousand nine hundred and eighteen.

(Signed) E. BOYLAN,
Captain A. G., U. S. A.

Stamp reading: "Washington, D. C., Apr. 30, 1919. Paid $60, under Act of Congress Approved February 24, 1919. C. E. Gray, Major, Q. M. Corps."

Form No. 525, A. G. O.: On the reverse side appear the following enlistment record:

Name: Ray K. Atkinson. Grade: Private.
Inducted.
Enlisted Sept. 30, 1918, at Brookings, S. D.
Serving in First enlistment period at date of discharge.
Prior service: None.
Noncommissioned officer: Never.
Marksmanship, gunner qualification, or rating: No Practice.
Horsemanship: No Practice.
Battles, engagements, skirmishes, expeditions: None.
Knowledge of any vocation: Student.
Wounds received in service: None.
Physical condition when discharged: Good.

Typhoid prophylaxis completed ———.
Paratyphoid prophylaxis completed Oct. 23, 1918.
Married or single: Single.
Character: Excellent.
Remarks: No A. W. O. L. or absence from duty under G. O. 45 W. D. 1914 or 31 of 1912.
Travel paid to Brookings, S. D.
Signature of soldier: (Signed) Ray K. Atkinson.
(Signed) G. L. DAILEY,
Captain M. C., Commanding Service Co.

Stamps reading: "South Dakota Soldiers' Compensation Board bonus paid $43.50, Date 3/31/22"; "Paid in full $97.54 at Forrest, Ga., this — day of Dec. 26, 1918. Geo. H. Chase, Captain Q. M. C."; "Transportation issued"; stamp reading "Dec. 26, 18", the remaining portion illegible.

Endorsed: 644 "Filed May 2, 1934 (El Paso Division), D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas. By (Signed) Flora L. Linker, Deputy Clerk"; "State of South Dakota, Brookings County. SS. Office of Register of Deeds. Filed for record this 1st day of Aug., A. D. 1921, at 1:20 o'clock P. M. Recorded in Book E of Disch. on page 271. (Signed) A. Nyman, Register of Deeds." 60c. pd. Is. Board.

[SEAL]

Q. Did you pay your premiums on the War Risk Insurance?
A. I have.
Q. Up until what date?
A. I paid the last one just a few days ago.

COUNSEL FOR DEFENDANT. We object to the testimony of the payment of premiums, because the premium receipts or other evidence of payment would be the best evidence. As matter of fact, it seems there was some hiatus in the payment of those premiums. However, that doesn't have any bearing on that converted policy, particularly, but if the plaintiff is going to testify to continuous payment of premiums from date of issuance of the War Risk Insurance until the date of conversion in 1927, we object to his testimony.

21 COUNSEL FOR PLAINTIFF. I believe he has those receipts.

Q. Do you have the receipts for your insurance premiums on your War Risk policy?
A. I do.

THE COURT. The Court will make this inquiry, is the controversy over the question of payment of premiums on the converted policy of insurance sued upon?

COUNSEL FOR DEFENDANT. There is no controversy except this, that I expect to have him identify a certain application for reinstatement; of course, that would be unnecessary unless he lapsed his policy. If he testifies he continuously paid the premiums, there would be no

necessity for an application for reinstatement. It would have no particular bearing as far as liability.

THE COURT. Is it conceded that the converted policy on which he sued was in force and effect at the time of the plaintiff's claim? If properly issued, no contest as to the issuance, and it was in force, it seems to the Court possibly all that preceded that would be immaterial.

COUNSEL FOR DEFENDANT. There is no conflict on the payment of premiums on the converted policy.

THE COURT. What is the necessity of going into the showing of payment before?

COUNSEL FOR DEFENDANT. I don't think there would be.

COUNSEL FOR PLAINTIFF. You mean you concede the premiums on the converted policy have been paid?

COUNSEL FOR DEFENDANT. I understood he has the receipts.

22 THE COURT. The matter inquired about is in reference to payments of premiums on some insurance issued prior.

COUNSEL FOR PLAINTIFF. I will withdraw the question.

THE COURT. The Court was seeking to simplify the record and eliminate immaterial matter.

I applied for converted insurance about July 1, 1927. A policy was issued to me at that time; that is the policy.

COUNSEL FOR PLAINTIFF. I introduce the policy in evidence.

COUNSEL FOR DEFENDANT. There will be no objection to the introduction of the policy.

THE COURT. There being no objection, the policy will be admitted in evidence.

(Whereupon said policy was received in evidence, marked "Plf.'s Ex. 3", and is in words and figures as follows, to-wit:)

EXHIBIT 3

Age of insured 31:	Monthly	$7.20
	Quarterly	21.50
	Semiannual	42.90
	Annual	85.10

Amount of insurance.—Insured premium.—The United States of America hereby grants insurance of ten thousand $10,000 Dollars to Ray Keith Atkinson (the Insured). This insurance is granted in consideration and subject to the terms and conditions hereinafter set forth, and in further consideration of the payment of the monthly premium of $7.20 on the 1st day of each month for a period of

23 sixty (60) months and thereafter the monthly premium of $17.60 on the 1st day of each succeeding month during the lifetime of the Insured except as hereinafter provided. Receipt of the first premium is hereby acknowledged.

Mode of payment at death or disability.—This insurance is payable in monthly installments of $57.50 (hereinafter called the monthly installment) in the event of the total permanent disability of the Insured or of his death, unless one of the Optional Settlements is selected as hereinafter provided, then, in the event of the death of the

Insured this insurance is payable in accordance with the Optional Settlement so selected.

Beneficiary.—This insurance, subject to the beneficiary provisions hereof, is payable to Esther C. Atkinson, his wife, thirteen-twentieths, 13/20, Ella V. Atkinson, his mother, seven-twentieths, 7/20, hereinafter called the beneficiary, in one sum.

Disability benefits to insured.—Upon due proof of the total permanent disability of the Insured while this policy is in force, the monthly installments shall, except as hereinafter provided, be payable to the Insured and continue to be so payable during total permanent disability so long as he lives, and payment of all premiums due after receipt of such proof during total permanent disability shall be waived.

Death benefits to beneficiary.—Upon due proof of the death of the Insured while this policy is in force, the monthly installments, without interest, which have accrued since the death of the Insured, the first installment being due on the date of the death of the Insured, shall be paid to the beneficiary designated, and thereafter the payment of the monthly installments shall continue to be so payable until two hundred and forty installments in all, including any paid to the Insured during his lifetime on account of total permanent disability, shall have been paid; but if two hundred and forty or more installments shall have been paid to the Insured on account of total permanent disability, no death benefit shall be payable. If Optional Settlement 1, 2, or 3 has been selected, payment shall be made accordingly, subject to deduction on account of disability payments.

24 Place of payment.—All payments under this policy shall be payable at the United States Treasury in the City of Washington, District of Columbia.

Dividends.—This insurance shall participate in dividends from gains and savings.

Conditions.—The conditions, benefits, and privileges recited on the succeeding pages hereof constitute a part of this contract.

This policy takes effect on the 1st day of June, Nineteen Hundred and Twenty Seven.

FRANK T. HINES,
Director United States Veterans' Bureau.

Countersigned at Washington, D. C.
Examined and Issued June 13, 1927.

(Signed) J. K. RYE, *Registrar.*

(Page 2.)

CONDITIONS, BENEFITS, AND PRIVILEGES

Payment of premiums.—1. Premiums are due and payable monthly in advance in legal tender of the United States of America to the Treasurer of the United States in the City of Washington, District of Columbia.

(a) Premiums may be paid annually, semiannually, or quarterly, in advance, in which case the premium payable will be the sum of the monthly premiums for the period discounted at three and one-half per centum per annum. The discounted premiums for these periods are stated on the first page hereof. At maturity by death or otherwise, the discounted value at three and one-half per centum per annum of the premiums paid in advance beyond the current calendar month shall be refunded to the Insured, if living; otherwise to the beneficiary.

(b) If any premium be not paid when due, this policy shall cease and become void except as hereinafter provided.

25 Grace for payment of premiums.—2. For the payment of any premium under this policy, a grace of thirty-one days without interest will be allowed, during which time the policy will remain in force; but if the policy shall become a claim within the grace period, the unpaid premiums shall be deducted from the amount of insurance payable.

Reinstatement.—3. This policy, if it has not been surrendered for a cash value, may be reinstated at any time after lapse upon evidence of the insurability of the Insured satisfactory to the Director of the United States Veterans' Bureau, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with policy loan interest. However, if such indebtedness with interest would exceed the reserve of this policy at the time of application for reinstatement of said policy, then the amount of such excess shall be paid by the Insured as a condition of the reinstatement of indebtedness and of this policy.

Dividends.—4. This policy shall participate in and receive such dividends from gains and savings as may be determined by the Director of the United States Veterans' Bureau. Any dividends so apportioned may be taken in cash, and if not so taken, shall be left on deposit to accumulate at such rate of interest as the Director of the United States Veterans' Bureau may determine, but at a rate never less than three and one-half per centum compounded and credited annually, and payable, if not previously withdrawn, at the maturity of this policy to the person entitled to its proceeds.

Nonforfeiture provisions.—5. Cash value, paid-up insurance, extended insurance, and policy loan provisions as follows shall be effective at any time after the completion of the sixth policy year, all values, reserves, and net single premiums being based on the American Experience Table of Mortality, with interest at the rate of three and one-half per centum per annum.

Cash value.—(a) The cash value at the end of the sixth policy year and at the end of any policy year thereafter, for which
26 premiums have been paid in full, shall be the reserve, together with any dividend accumulations. For each month after the

sixth policy year, for which month the premium has been paid, the reserve at the end of the preceding policy year shall be increased by one-twelfth of the increase in reserve for the current policy year. Upon written request therefor and upon complete surrender of this policy with all claims thereunder, made by the Insured while this policy is in force, but not later than three calendar months from the due date of the premium in default, the United States will pay to the insured the cash value hereof less any indebtedness.

Paid-up insurance.—(b) If the policy has not been surrendered for cash, upon default in payment of premium and upon written request of the Insured and complete surrender of this policy with all claims thereunder within three calendar months after the due date of the premium, the United States will issue paid-up insurance for such amount as the cash value less any indebtedness will purchase when applied as a net single premium at the attained age of the Insured. The paid-up insurance shall be with right to total and permanent disability benefits and with right to dividends. The number of monthly installments payable upon due proof of total and permanent disability or death of the Insured under such paid-up insurance will be the same as would then be payable under this policy. The Insured may at any time surrender the paid-up policy for its cash value, or obtain a loan on such paid-up insurance.

Extended insurance.—(c) Upon default in payment of premium and the expiration of the grace period, if the policy has not been surrendered for cash or for paid-up insurance, this policy shall be extended automatically as term insurance for an amount of insurance equal to the face value of the policy, less any indebtedness for such time from the due date of the premium in default as the cash value less any indebtedness will purchase when applied as a net single premium at the attained age of the Insured. The extended insurance shall be with right to total and permanent disability benefits and with right to dividends payable in cash only. The number of monthly installments payable upon due proof of total and permanent disability or death of the Insured under such extended insurance will be the same as would then be payable under this policy. The extended insurance shall not have a loan value, but shall have a cash value.

27 Policy loans.—(d) At any time after the expiration of the sixth policy year and before default in payment of any subsequent premium, and upon execution of a loan agreement satisfactory to the Director, the United States will lend to the Insured on the sole security of this policy any amount which shall not exceed ninety-four per centum of the cash value, and any indebtedness shall be deducted from the amount advanced on such loan. The loan shall bear interest at a rate not to exceed six per centum per annum, payable annually, and at any time before default in payment of premium the loan may be repaid in full or in amounts of five dollars or any multiple thereof. Failure to pay either the amount of the

loan or the interest thereon shall not avoid this policy unless the total indebtedness shall equal or exceed the cash value thereof. When the amount of the indebtedness equals or exceeds the cash value of this policy shall cease and become void.

6. *Table of guaranteed surrender values*

End of policy (year)	Cash-surrender value for each $1,000 of insurance (full reserve of policy)	Paid-up insurance with disability benefits for each $1,000 of insurance	Extended insurance with disability benefits	
			Years	Days
6	$12.29	$31.87	1	142
7	24.98	63.48	2	296
8	38.07	94.79	4	96
9	51.58	125.80	5	261
10	65.50	156.44	7	47
11	79.84	186.71	8	169
12	94.62	216.62	9	247
13	109.84	246.12	10	276
14	125.48	275.18	11	252
15	141.55	303.76	12	177
16	158.04	331.84	13	56
17	174.93	359.37	13	255
18	192.22	386.36	14	52
19	209.85	412.69	14	178
20	227.82	438.39	14	274
21	246.10	463.43	14	342 Stamp
22	264.66	487.78	15	21 741
23	283.49	511.44	15	44 36
24	302.54	534.38	15	47
25	321.80	556.62	15	33
30	420.04	657.09	14	153
35	518.20	739.97	13	89

28 (a) The above values are based on an insurance of $1,000 without indebtedness, and with no dividends standing to the credit of the policy, and no installments having been paid on account of total permanent disability. If this policy provides for a larger amount of insurance than $1,000, the cash values, loan values, and paid-up insurance values will be increased proportionately. The periods of extended insurance as given in the above table are the same irrespective of the amount of the insurance.

Values, first five years.—7. After this policy has been in force by the payment of premiums for twelve months and before the expiration of the five-year term period, the reserve, if any, together with any dividend accumulations less any indebtedness, may be paid to the insured in cash or used to purchase paid-up term insurance for the unexpired portion of the five-year term period, provided the insured makes written request therefor and surrenders this policy before the expiration of the grace period. If the Insured does not make written request and surrender of the policy before the expiration of the grace period, then the reserve, if any, plus any dividend accumulations, less any indebtedness, will be used as a net single premium to purchase extended term insurance from the due date of the premium in default, but not to extend beyond the termination of the five-year term period. All calculations will be made as provided in paragraphs 5, 5 (a), 5 (b), and 5 (c) of this policy.

Indebtedness at maturity of policy.—8. At the maturity of this policy by total permanent disability or death, any indebtedness, unless paid off in cash, shall be liquidated by reducing the monthly installment in the proportion which the indebtedness bears to the commuted value of the monthly installments, as may then be payable hereunder, excluding dividend accumulations. If the policy shall be payable in one sum at death, any indebtedness shall be deducted from the amount payable under the policy.

Incontestability.—9. This policy shall be incontestable after the insurance has been in force for six months from the date of issuance or reinstatement, except for fraud or nonpayment of premiums, and the policy is issued free of restrictions as to travel,
29 residence, occupation, or military or naval service. However, no insurance shall be payable for death inflicted as a lawful punishment for crime or military offense, except when inflicted by the enemy: Provided, That the cash value hereof less any indebtedness on the date of such death shall be paid to the designated beneficiary if living, or if there be no designated beneficiary alive at the death of the Insured, the said value shall be paid to estate of the Insured.

Misstatement of age.—10. If the age of the Insured has been understated, the amount of the insurance payable under the policy shall be such exact amount as the premium paid would have purchased at the correct age; if overstated, the excess of premiums paid shall be refunded without interest. Guaranteed surrender and loan values will be modified accordingly. The age of the Insured will be admitted by the United States Veterans' Bureau at any time upon satisfactory proof.

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Total permanent disability.—11. Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of such total permanent disability, and any premiums paid after receipt of due proof of total permanent disability, and within the six months shall be refunded without interest.

(a) Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums

paid after the date of such total permanent disability shall be refunded without interest.

30 Recovery from disability.—12. Notwithstanding proof of total permanent disability may have been accepted as satisfactory, the Insured shall at any time, on demand, furnish proof satisfactory to the Director of the United States Veterans' Bureau of the continuance of such total permanent disability, and if the Insured shall fail to furnish such proof, all payments of monthly installments on account of such total permanent disability hereunder shall cease, and all premiums thereafter falling due shall be payable in conformity with this policy. Thereafter the premium to be paid, and the cash values, paid-up insurance value, and loan values shall be reduced so that the resulting premium and values shall bear the same proportion to the premium and values, respectively, specified hereon, that the commuted value of the installments (two hundred and forty less the number paid) bears to the commuted value of two hundred and forty installments. The extended-insurance value shall be modified accordingly.

Total permanent disability benefits under paid-up insurance.—13. If one or more monthly installments be paid on account of total permanent disability incurred under a paid-up insurance, then there shall be paid to the beneficiary upon the surrender of this policy at the death of the Insured the remaining unpaid installments (two hundred and forty less the number paid). If an optional settlement has been selected, payment shall be made accordingly.

Total permanent disability benefits during period of extended insurance.—14. In case total permanent disability occurs during the period of extended insurance and payments are made on account of such disability and recovery from such disability also takes place, then (a) if the recovery takes place before the end of the period of extended insurance, the insurance shall be reduced accordingly, and the insurance, as reduced, shall be continued in force; (b) if the recovery takes place after the end of the period of extended insurance, all rights and claims hereunder shall cease, except as to the privilege to reinstate.

Assignment.—15. The proceeds of this policy shall not be assignable, except that any person to whom this insurance shall be

31 payable may assign his interest in this insurance to any other beneficiary within the class permitted by the World War Veterans' Act or any amendment or supplement thereto. No such assignment of this policy shall be binding upon the United States unless in writing and until filed in the United States Veterans' Bureau, Washington, D. C. The United States assumes no responsibility for the validity of any assignment, the proceeds of this policy shall not be subject to the claims of creditors of the Insured or creditors of any beneficiary to whom the proceeds may be awarded, except claims of the United States arising under the War Risk Insurance Act or the World War Veteran's Act.

Exempt from taxation.—16. The proceeds of this policy are exempt from all taxation.

Beneficiary.—17. The insured shall have the right at any time, and from time to time, and without the consent or knowledge of the beneficiary, to change the beneficiary under this policy within the class of beneficiaries permitted by the World War Veterans' Act or any amendment or supplement thereto. A change of beneficiary must be made by written notice to the United States Veterans' Bureau over the signature of the Insured and shall not be binding on the Bureau unless received and indorsed on the policy by the Bureau. A change of beneficiary must be forwarded to the Bureau by the Insured or his agent and must be accompanied by the policy. A change of beneficiary may be indorsed during the lifetime of the Insured or after his death, and when so indorsed said change shall be effective as of the date the insured signed the written notice of change of beneficiary. The Bureau shall be protected in all payments made to the beneficiary last of record and before receipt of notice of a change of beneficiary, and no payments so made shall be paid again to the changed beneficiary. The Insured may exercise any right or privilege given under the provisions of this policy without the consent of the beneficiary. An original designation of a beneficiary may be made by the last will and testament, but no change of beneficiary may be made by last will and testament.

(a) If no beneficiary within the permitted class be designated by the Insured, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the Insured, then there shall be paid to the estate of the insured the present value of the remaining unpaid monthly installments.

32 (b) If the designated beneficiary survives the Insured and dies before receiving all the installments payable and applicable, then there shall be paid to the estate of such beneficiary the present value of the remaining unpaid monthly installments.

(c) Where a beneficiary at the time of designation by the insured is within the permitted class of beneficiaries and is the designated beneficiary at the time of the maturity of the insurance because of the death of the Insured, such beneficiary shall be deemed to be within the permitted class, even though the status of such beneficiary shall have been changed.

Change to other forms.—18. This policy may be exchanged for a policy of the same amount, bearing the same date and based on the same age, on any plan of insurance issued by the United States Veterans' Bureau at a higher rate of premium, upon payment of the difference in reserve on this policy and the reserve on the new policy. Such exchanges will be made without medical examination upon complete surrender of this policy while in force and within five years from the effective date hereof.

(a) This policy may be exchanged for a policy of the same amount on any plan of insurance issued by the United States Veterans' Bureau

at a higher rate of premium, upon payment of the current monthly premium at the attained age of the insured for the plan of insurance selected. The reserve (if any) on this policy will be allowed as a credit on the current monthly premium. Such exchange will be made without medical examination upon complete surrender of this policy while in force and within five years from the effective date hereof.

Optional settlement.—19. The Insured may select one of the Optional Setlements set forth below, but notice of the selection shall not be valid unless and until it is recorded in the United States Veterans' Bureau. The Insured may revoke his selection of the Optional Settlement, but the revocation shall not be valid unless and until it is recorded in the United States Veterans' Bureau. If the Insured does not select one of said Optional Settlements, then he shall be deemed to have made no election, and the insurance shall be payable in two hundred and forty monthly installments, unless an election under Option Two or Option Three is made by the beneficiary.

33 (a) If the Insured has not made an optional selection, a designated beneficiary or beneficiaries, at the maturity of this policy by death, may select settlement under Options Two or Three as set forth below, but the selection shall not be valid unless and until it is recorded in the United States Veterans' Bureau. If the Insured has made an optional selection, a designated beneficiary, at the maturity of this policy by death, may elect to receive such insurance in installments spread over a greater period of time than that selected by the Insured.

(b) Settlement under one of these options shall be considered full and complete settlement of all liability under this contract.

(c) The values shown in the following options are based on an insurance of $1,000 without indebtedness. If there is indebtedness under this policy, or the Insured has received any payments on account of total permanent disability, the value will be decreased accordingly. If this policy increased proportionately.

20. Optional settlements in lieu of monthly installments of $5.75 payable on the death of the insured under the terms of this policy, subject to the beneficiary provisions hereof.

Option one—Insurance payable in one sum.—Settlement under this option will be made only when selected by the Insured during his lifetime or by his last will and testament. When such selection has been made, $1,000 will be payable in one sum at the maturity of this policy by death.

Option two—Insurance payable in elected installments.—The installments notes below will be payable for an agreed number of months (not less than thirty-six) to the designated beneficiary, but if such beneficiary dies before the agreed number of monthly installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions hereof.

34

Number of monthly installments	Amount of each monthly installment	Number of monthly installments	Amount of each monthly installment
36	$29.19	144	$8.46
48	22.27	156	7.94
60	18.12	168	7.49
72	15.35	180	7.10
84	13.38	192	6.76
96	11.90	204	6.47
108	10.75	216	6.20
120	9.83	228	5.97
132	9.09	240	5.75

Option three—Insurance payable in installments throughout life.—The installments noted below will be payable throughout the lifetime of the designated beneficiary, but if such designated beneficiary dies before two hundred and forty such installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions hereof.

Age of beneficiary at time of death of insured	Amount of each monthly installment	Age of beneficiary at time of death of insured	Amount of each monthly installment
10	$3.67	45	$4.79
15	3.75	50	5.07
20	3.84	55	5.35
25	3.96	60	5.56
30	4.11	65	5.70
35	4.30	70	5.75
40	4.52	75	5.75

Amounts of monthly installments for other ages will be furnished upon request.

35 Authority.—21. This insurance is granted under and subject to the provisions of the World War Veterans' Act, 1924, and amendments and supplements thereto. No person, except the Director of the United States Veterans' Bureau may waive forfeitures, or make, modify, or discharge contracts, or extend the time for paying a premium, or bind the United States by making any promise respecting any benefits hereunder.

United States Veterans' Bureau. Form 745—Endorsed.—The United States of America. Government life insurance. Policy No. K 634242 Amount $10,000. Name Ray Keith Atkinson.

Notice.—It is not necessary for the Insured or the Beneficiary to employ the agency of any person, firm, or corporation in collecting the insurance under this policy, or in receiving any of its benefits. Time and expense will be saved by writing direct to the United States Veterans' Bureau, Washington, D. C. Five-year convertible term policy. 745. Stamp reading: "Filed May 2, 1934 (El Paso Division) D. H. Hart, Clerk, U. S. District Court, West. Dist. of

Texas By (Signed) Flora L. Linker, Deputy Clerk"; also stamp reading "Received Dec. 10, —", the remaining portion being illegible.

I have paid my premiums on that converted policy. The last premium was paid just a few days ago. I haven't got the receipt for that last premium, it hasn't returned yet. I sent that premium in on April 28th. I made application for insurance benefits under that policy of converted insurance.

COUNSEL FOR PLAINTIFF. I would like to introduce this application for benefits.

COUNSEL FOR DEFENDANT. If it is introduced, Your Honor, only for the purpose of showing that a claim was presented to the Government, we offer no objection. I assumed that is the reason.

COUNSEL FOR PLAINTIFF. That is the reason, Your Honor, to show that the claim was made, and the date of the claim.

36 COUNSEL FOR DEFENDANT. No objection.

THE COURT. It will be admitted for the purpose, and limited purpose, announced by counsel for plaintiff.

Whereupon, said claim was received in evidence for the limited purpose indicated, was marked "Plf's Ex. 4" and is in words and figures as follows, to wit:

EXHIBIT 4

Veterans' Administration, Insurance Claims Council, Form 579 Revised May 1931.

Claim Number C.

Statement of claim for insurance total permanent disability.—If the insured is incompetent or dead the statement of claim must be completely executed by the legal representative of the estate, or if there is no legal representative the statement of claim must be executed by the beneficiary under the insurance contract.

Part I

1. Name of Insured (First) (Middle) (Last name) (Please print or type) Ray Keith Atkinson.

2. Policy Numbers T- ——, K-634242, K- ——.

3. Home Address (Street and No.) 4604 Pershing Drive, (Post Office) El Paso, (State) Texas.

4. Mailing Address: 4604 Pershing Drive, El Paso, Texas. C—.

5. Make (x) after branch of service in which you served: Army x Navy Marine Corps Coast Guard.

6. Serial Number: 3780179.

7. Date you last entered the service: September 30, 1918.

8. Date and place of last discharge: 12/26/1918 Camp Greenleaf, Ga.

9. Were you disabled at the time of discharge? Yes.

10. Date on which the alleged total and permanent disability began: January 1, 1928.

37 11. Give a complete statement in your own words of your present disability. Deaf in both ears.

12. Places and dates of residence since the date on which the alleged total and permanent disability began.

or R. F. D.

Date:

1-1-28 to 3-1929 from March 1929 to present time.

Street and Number:	Post Office:	State:
Evergreen Ave.	Phoenix,	Arizona.
	El Paso,	Texas.

Stamps reading: "Filed May 2, 1934 (El Paso Division), D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, By (Signed) Flora L. Linker, Deputy Clerk"; "Received Dec. 10, 1932, Adjudication Service, Albuquerque, N. M."

(Page 2.)

13. Names and addresses of hospitals at which you have been treated since the date on which the alleged total and permanent disability began.

Name.	Address.	Date of Admission.	Date of Release.
None.			

14. Have you been employed at any time or engaged in any occupation, business, or profession since the date on which the alleged total and permanent disability began? (Answer "Yes" or "No.") No. If the answer is "Yes", give (a) Beginning and ending dates of each period of employment; (b) Places of employment; (c) Names and addresses of associates or employers; and (d) the reason for termination of employment. —.

15. What was your occupation at the time the alleged total and permanent disability began? Give name and address of employers or associates, average number of hours worked each day, average weekly, monthly, or annual income from your employment, nature of work, and how efficiently performed. Architectural designer.

16. Give names and addresses of all physicians who have attended you since the alleged total and permanent disability began, except the physicians who treated you at the places named in your answer to question number 13 above. Have not been treated since
38 1927. Have been told there is nothing that can be done for my ears; hence have had no treatments.

17. Do you have other insurance? (Answer "Yes" or "No.") No.

If the answer is "Yes", please give Name of Company, Amount, Date of Issue, Disability payments. —.

Stamp reading: "Received Dec. 10, 1932, Regional Office, Albuquerque, N. M."

(Page 3.)

Section 501 of the W. W. V. Act, as amended, provides as follows: "That whoever in any claim * * * compensation or insurance, or in any document required by this Act, or by regulations under this Act, makes any sworn statement of a material fact knowing it to be

false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both."

Oath of Insured.—18. I, the undersigned, being duly sworn, depose and say that each question has been truthfully and completely answered to the best of my knowledge, information, and belief; and I hereby make claim for payment of disability benefits under the contract of insurance.

(Signed) RAY KEITH ATKINSON,
(Signature of Insured.)

19. Subscribed and sworn to before me this 6 day of December 1932 by Ray Keith Atkinson, to me personally known, and to whom the statements herein were fully made known and explained.

[SEAL] (Signed) M. A. HARLAN,
(*Notary Public.*)

My commission expires May 31, 1933.

39 Part II

Not to be executed unless the Insured has a policy of United States Government life insurance and has paid the additional premium for the Total Disability Provision authorized by Section 311 of the World War Veterans' Act, 1924, as amended.

I hereby make claim for waiver of the payment of premiums and the payment of the monthly income in accordance with the Total Disability Provision attached to and made a part of United States Government life insurance policy number K- ——, in the amount to $ ——.

———— ————,
(Signature of Insured.)

Part III

Report of physical examination if claim is under U. S. Government life insurance.—(a) If the Insured is now under the care and treatment of a private physician, or has been at any time since the date the alleged total and permanent disability began, under the care of a private physician, the following report of physical examination should be made by such private physician.

(b) If the Insured is now under the care and treatment of a medical officer of the Veterans' Bureau it will not be necessary to submit a report of physical examination.

1. Name of person examined ————————————
2. How long have you known him? ————————————
3. Address ————. 4. Age ————. 5. Race ————.
6. Place of examination ————————————
7. Date of examination ————————————

If in a hospital, give (a) Date of admission ———. (b) Reason ———.

(Page 4.)

8. Present complaint (Subjective symptoms, not diagnosis): (See statement for Insured's signature at bottom of page 4 of this form.)

9. X-ray examination (Give date, place, authorship, interpretation) ———.

40 10. Laboratory findings (may be copied from original laboratory report) ———.

11. Report of physical examination: Temperature ———; Pulse ———; Time of day ———; Blood pressure: Systolic ———; Diastolic ———; Height ——— inches; Weight, stripped ———; Standard weight before onset of present illness ———; Highest weight over the past year ———; Lowest weight over the past year ———; Did you weigh the Insured ———; Sputum: Positive ——— or negative ——— (if deemed necessary there should be a sputum examination certified to by the examining physician). Further report of examination is as follows: ———.

12. Is Insured be-ridden? ———. 13. Is he confined to his bed? ———.

14. Is insured able to travel? ———. 15. Do you advise observation to determine diagnosis? ———. 16. Will Insured accept hospital care? ———. 17. Is an attendant necessary for travel? ———.

18. Did you examine the Insured yourself? ———.

19. State in which you are licensed to practice medicine ———.

20. Signature of Examiner ———. Date ———. Address of Examiner ———.

21. Statement by Insured: My answer to Question 8, Part III, has been read to me, and I hereby certify that to the best of my knowledge and belief the disabilities therein recorded are all that I am suffering.

(The examining physician will read complaints noted in answer to Question 8, Part III, before the Insured's signature is affixed.)

———,

(Signature of Insured.)

Stamp reading: "Received Dec. 10, 1932, Regional Office, Albuquerque, N. M."

Q. Did you receive this letter from the defendant [Handing to witness]?

A. I did.

COUNSEL FOR DEFENDANT: That being a letter of denial, if it is offered for the sole purpose of showing denial, no objection.

41 THE COURT. Does the Court so understand that is the purpose of plaintiff?

COUNSEL FOR PLAINTIFF. That is the purpose of the introduction.

Whereupon said letter was received in evidence, marked "Plf's Ex. 5", and is in words and figures as follows, to wit:

EXHIBIT 5

VETERANS' ADMINISTRATION,
WASHINGTON, *February 15, 1933.*

Your file reference: In reply, refer to FDB A C 1 675 334.
Mr. RAY KEITH ATKINSON,
4604 Pershing Drive, El Paso, Texas.

DEAR SIR: This is with further reference to the above-entitled claim. You are informed that a decision was rendered on February 14, 1933, by the Insurance Claims Council to the effect that the evidence is not sufficient to establish as a fact that the former insured was totally and permanently disabled at a time when the contract of insurance was in force, and therefore the claim has been denied.

You may consider such denial final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended.

The claimant may appeal from the decision of the Insurance Claims Council to the Administrator of the Veterans' Administration by giving notice in writing to this office within sixty days from the date of receipt of this letter.

If you accept the denial of the claim by the Insurance Claims Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., to your last address of record.

42 The case folder is being forwarded to the Veterans' Administration at Albuquerque, New Mexico. Any further inquiries concerning your claim should be directed to that office.

Respectfully,

H. L. McCOY, *Director of Insurance.*

Insurance Form 909. Rev. Dec. 1932. Claim . . P. T. Disability denied.

On the reverse side, stamp reading: "Filed May 2, 1934 (El Paso Division) D. H. Hart, Clerk, U. S. District Court, West Dist. of Texas. By (Signed) Flora L. Linker, Deputy Clerk."

Q. Now, Mr. Atkinson, when you enlisted in the military forces of the defendant, were you put on general duty or special duty?

A. Special.

Q. And do you remember the reason for that special duty?

COUNSEL FOR DEFENDANT. If the Court please, we object in the interest of conserving time, we don't think that has any materiality here at all. He has alleged permanent and total disability, which must have existed or must have come into being between the date of issuance of the converted policy June 1st, 1927, and some date prior to the denial of the claim or filing of the claim with the Veterans' Bureau, I don't think what happened way back there would have any material bearing on the matter.

THE COURT. The Court will hear counsel for plaintiff in response to the objection urged.

COUNSEL FOR PLAINTIFF. If the Court please, the purpose of the testimony that I am seeking to offer is to show that the plaintiff was examined by the Government at a time prior to the issuance of the certificate that we are suing on, it may, I think, have a very material bearing.

43 COUNSEL FOR DEFENDANT. Of course, what he is talking about is the old War Risk Insurance policy. My sole purpose of making the objection was to conserve time.

THE COURT. Very well; you may proceed.

I was given a physical examination at the time I was taken in the service. I had an examination at that time of my ears. After that examination the defendant admitted me in the service. That was a limited service. I have worked since the time that I converted my War Risk Insurance policy. Since July 1st, 1927, I have been doing architectural work. I worked at Kansas City, Missouri, and was receiving compensation for my work. I began working for that firm in approximately 1923. It would be in 1928 that I severed my connections with the firm, oh, I would say approximately the latter part of June or the first part of July 1928. During the latter part of that period of time I was earning, I think, $45.00 a week. That was during the period of the latter part of June or July 1928. Yes; that is the salary I was getting at that time.

About that time I went to a doctor for treatment. The name of the doctor was Dr. Roberts. I had a consultation with him.

Q. What happened after that consultation with him?

A. He advised me to——

COUNSEL FOR DEFENDANT. We object to any hearsay testimony.

THE COURT. The Court will sustain the objection as to the statement made by the doctor. You probably have the doctor's testimony; I don't know whether you have or not.

COUNSEL FOR DEFENDANT. We have.

THE COURT. The Court will sustain the objection made by counsel as hearsay, the statement started to be related by the witness as shown to be hearsay.

44 After that consultation I resigned my position and came West. It would be some time in July 1928 that I came West. At that time I went to Los Angeles. I stayed there five or six months. I did not work any while out there.

After I left Los Angeles I went to Phoenix. I did very little work there. I worked a short time for Fitzhugh & Byron. I received pay for it. They paid me between $500.00 and $600.00; I don't recall the exact amount. I can't tell you the exact time I was there either.

When I left Phoenix I came here. I am living here now and I was when the suit was filed here. I have done very little work since I have been in El Paso. I worked for Mr. Thorman, who is an architect. I can't say how long I worked for him; I think a few

weeks; I don't remember, but it was a very short time. During my employment with him I was discharged. It would be in 1930, I think, that I worked for Mr. Thorman. I have not worked for anybody since I left Mr. Thorman.

I was examined at one time by Dr. Grove, who lives in Arlington, South Dakota. The date of the first examination would be in 1925. I was examined more than once by him. The date of the last examination, I think, was in 1931.

This instrument I have here is called an ear phone. I cannot hear conversation without that. Whether I can hear a loud shout without it, if spoken close to my ear, all depends upon how loud it is. Without my ear phone I cannot distinguish conversation to any degree of accuracy by even a shout. I can read lips to some extent. I cannot carry on an intelligent conversation by lip reading alone. It would be impossible for me to close my eyes and carry on an intelligent conversation by the use of my ear phone. The only way that I can explain how I can understand you talking to me now is that it is a combination between catching a sound or word in the ear phone and seeing the word spoken with the lips; that is about the only way I can describe it; it is a combination of the two, more or less.

This ear phone is operated by a battery. If somebody would employ me and I were required to work eight hours a day and it would be necessary to use my ear phone for the eight hours, it would take perhaps sixteen batteries in a day. Each battery costs seventy-five cents.

On cross-examination: I beg pardon, I didn't hear, did you ask me what year I came to El Paso first? It was in 1930. As to what character of education I have had, I will say I went to college at South Dakota State College. I took a general science course.

I worked in an architect's office in Kansas City. I did architectural drafting there. I worked in a drafting room. There were other men working in there, other draftsmen. My duties as a draftsman were seeing clients and seeing salesmen and making drawings. I wouldn't say that my job was principally making drawings; I would say about fifty percent.

My job at Phoenix with Fitzhugh was drafting. The only work I did out there as a tracer was my own drawings. A tracer in an architect's office is a thing of the past. A draftsman draws.

Q. Did you graduate from this college in North Dakota?

A. No, sir.

Q. What did you do after that—you taught school?

A. What did you say, did I graduate?

Q. From the college in North Dakota?

A. South Dakota.

Q. You didn't graduate?

A. I did.

46 I took a degree. I taught school thereafter for some time. I taught industrial training. I taught no machine shop practice, but drafting. As to whether I am qualified as a draftsman depends upon the type of drafting. By that I mean architectural drafting only. In other words, I am qualified as an architectural draftsman. I never engaged in business for myself to any great extent.

As I testified, when I left Kansas City I went to California, and I was out there some six or eight months. I did not work any in California. I tried to get jobs, but I couldn't get any jobs. It is correct that they didn't have any jobs out there available—they had them available, but they didn't hire me; I called on several, but I could not obtain one.

I would say I stayed in Phoenix all told from a year and a half to two years, approximately—let's see, a year and a half to two years, I couldn't say exactly. Fitzhugh is the only architect I worked for. I did some other work individually. I did some drawings for a mortgage firm—I can't recall their name—and I did other drafting for a real-estate firm, not enough to consider as far as the living was going, one lives twelve months in the year; it was not enough to consider; I don't consider it work because it wasn't enough.

I would say you were standing about four feet and a half from me now.

Q. Now, Mr. Atkinson, where do you hear best, in a noisy place or quiet room or whereabouts?

A. I didn't get all you said.

Q. I will withdraw that question and ask it this way, isn't it a fact you hear better in a noisy place than in a quiet place?

A. Absolutely; yes.

I do have ringing in my ears. I can't answer the question as to how long I have noticed I hear better in a noisy place
47 than a quiet place, I don't really know. That is part of every physical exmination I have ever had.

It is a fact, absolutely, that the first time I went to see Dr. Roberts, in Kansas City, was not in 1928, but in 1926, about December 11th, 1926. He examined me at that time. As to whether he examined me again in 1928—I will say I was doctoring with Dr. Roberts during the period from 1926 some time until I left the city, I can't tell you the exact times I have seen him. I doctored with Dr. Roberts during that period of time.

Q. It is a fact, isn't it, that you told Dr. Roberts that you had noticed for a number of years, as a matter of fact, for about twenty years, that you would have deafness?

A. I don't think at that time I would admit deafness; I would admit a hearing defect; at that time I got by; I wasn't deaf then; I got by.

Q. You mean at what time?

A. The time that I first saw Dr. Roberts.

Q. Well, you haven't answered my question yet. Did you or did you not tell Dr. Roberts that you had had trouble with your ears for about twenty years, when you first went to see him in December 1926?

A. I probably did.

No; it isn't a fact that I had had trouble; I wouldn't say I had had trouble. The trouble has been there; I admit that the deafness has been there, but I wouldn't say up to that period, or during that period even; I wouldn't say I had trouble; I got along.

Beside having had Dr. Grove and Dr. Roberts examine me, I have had examinations at the Veterans' Bureau and also Dr. Vandevere here in this city. I was first examined by Dr. Vandevere a year ago.

I was examined by doctors, other than Dr. Grove, before I
48 went to see Dr. Roberts in Kansas City; I was examined by the Draft Board and I was examined by several doctors in the army. I was examined by a doctor after I got out of the army; it would be Dr. Hyde at Brookings, South Dakota. That was right after my discharge from the service. He made an ear examination. His initials are A. H., A. H. Hyde. He is now dead. As to what I went to him for examination for—I had a very bad cold at the time, and he gave me an ear examination and relieved the cold. I asked him for an ear examination. It was noticed that my hearing was worse than—it was a matter of my family had noticed my hearing was worse than it had been before and they had me go to him to see what was the matter. That was about 1919 or 1920—no; 1919. I beg pardon. That would be in January or February. I didn't go to him any more after that, that I recall.

Q. Did you go to any other doctors after that before you went to Dr. Grove in 1925?

A. Yes; there would be Dr. Grove at that time, too; I can't give the date.

Q. You mean you went to Dr. Grove before 1925?

A. No; in 1920—1919, I beg pardon.

Q. You went to Dr. Grove in 1919?

A. Yes.

Q. For ear trouble?

A. It would be the same as I went to Dr. Hyde for.

Q. Now, I hand you a paper here, Mr. Atkinson, which purports to be signed by Ray K. Atkinson, and which purports to be dated June 10th, 1921. I will ask you to examine that paper and tell me what it is. I will change the question, does that paper contain your signature? (Referring to application for Reinstatement of War Risk Term Insurance.) (Exhibit "A.")

A. Yes.

Q. Then, what is the paper?

49 COUNSEL FOR PLAINTIFF. We object to that, Your Honor, until we have a chance to examine it.

COUNSEL FOR DEFENDANT. I haven't offered it in evidence.

THE COURT. Let counsel conclude his examination, it is not offered. [Instrument is handed to counsel.]

Q. What is that paper. Mr. Atkinson?

COUNSEL FOR PLAINTIFF. We object to the question because the paper itself shows what it is.

THE COURT. Overrule the objection. You aren't offering it?

Q. Did you execute that on June 10th, 1921?

A. Yes.

Q. I will ask you this, Mr. Atkinson: It is a fact, is it not, that after you got out of the service in December 1918 you let your policy of War Risk Insurance lapse and then applied for reinstatement of it in June 1921?

A. Well, I don't recall that. I see from this that I did, yes; but I don't remember just what happened.

COUNSEL FOR DEFENDANT. This document having been identified by the plaintiff as having been executed by him on June 10th, 1921, we offer it in evidence to show that the plaintiff at that time applied for reinstatement of his War Risk Insurance and represented——

COUNSEL FOR PLAINTIFF. We object to any further statement of the contents of this document.

THE COURT. Both come before the Court. (Counsel step up before the Court.)

COUNSEL FOR PLAINTIFF. We object on the ground that it is immaterial to any issue herein, shows to be an application for reinstatement of the War Risk Insurance policy in 1921, while the suit is based on the converted policy, there is no pleading on which to base the introduction of this. He seeks to get it in on the ground that there is a question whether he had any treatment of the eye or ear, and whether he had or not in 1921 would be immaterial to any issue in this case.

50

COUNSEL FOR DEFENDANT. I didn't indicate the purpose of the offer. The plaintiff has already testified that after he got out of the army he was treated by two different doctors, and on this application for reinstatement, executed in 1921, of his insurance, he made a statement here, in answer to Question No. 10, which is "Have you ever been treated for any disease of brain or nerves . . . ear or eye", to which he answered "no." We think that is a material misrepresentation of his condition, and, furthermore, throws light upon his credibility, because he has already testified he was treated by two doctors.

COUNSEL FOR PLAINTIFF. The purpose he states there shows he is trying to get it in to impeach him, and we say it would be impeachment on an immaterial matter; whether he had been treated prior to 1921 would have no bearing on the issues in this case, we are not claiming any total disability prior to 1928, and whether he had been treated prior to 1921 would be wholly immaterial and is an attempt to impeach him on something immaterial.

THE COURT. The witness testified as to his treatment without objection, the Court doesn't see the materiality of this particular inquiry

made by the Government in connection with his statement at this time, in the condition of the record.

COUNSEL FOR DEFENDANT. I would like to qualify that a little bit, if I may; it may have considerable bearing later. Now, it has been held that a misrepresentation of a material matter on one of these applications was sufficient to void the policy issued thereafter.

51 THE COURT. I don't know whether you are entitled to that under a general denial.

COUNSEL FOR DEFENDANT. If the Court doesn't feel so, we will ask leave to file a trial amendment.

THE COURT. I am ruling on the record now had. Sustain the objection.

COUNSEL FOR DEFENDANT. Note an exception. We will ask leave to file a trial amendment to cover that.

COUNSEL FOR PLAINTIFF. We would like to strike out the testimony as to examinations made, other than admission to the army, prior to July 1927, on the ground that this suit is based on that policy and examinations prior to that date would be immaterial to any issue.

THE COURT. The Court will consider that matter and not rule at this time.

COUNSEL FOR DEFENDANT. Our exception is to the Court's ruling on the admissibility of this signed statement, because, as I understand, the Court rules it is not material at this time.

THE COURT. At this time and under the state of the pleadings, as they now exist in this case.

I hear a low-pitched sound better than a high-pitched sound. I can't say whether my condition has always been that way since my hearing has been impaired, I don't know. I have had treatment for my ears. I don't know how to answer your question as to what character of treatment I have had. There was no operation; the treatment has been internal treatments and exterior; for instance, I have been given treatments of medicine and then they placed electrical devices on both ears and heated them up, and cleaning my ears, and I don't know, putting all sorts of dope in the ear and throat. That consisted of the treatments.

As to whether Dr. Vandevere has treated me—you will have

52 to ask him, I don't know whether what he has given me would be a treatment or not, he has examined me. I can't say that any doctors in El Paso have treated me, that is, prescribed for me or done anything to my ears, as distinguished from just examining them. I imagine Dr. Roberts would be the last one that treated me.

COUNSEL FOR DEFENDANT. I have one other document which has exactly the same matter involved as that reinstatement application a moment ago, if the Court please, I will pass that up now and reserve the right to offer it later on, when the case is developed a little further, and I will call the plaintiff back.

THE COURT. All right.

COUNSEL FOR DEFENDANT. I imagine at this time the Court's ruling would be the same, so, for that reason, I will not offer it now; during the afternoon I may want to do so.

THE COURT. The Court cannot say, it if develops in the trial of this case, that the evidence inquired about would be in the nature of an impeachment of the witness' testimony on some material fact at issue; of course, it is admissible, the ruling of the Court is largely at this time based on the fact that it seemed to be upon an immaterial inquiry.

COUNSEL FOR DEFENDANT. I state this to the Court: I think it is material, but, in view of the Court's announcement about the pleadings, I want to prepare and present a trial amendment, which I will do at the noon hour, that will bring the matter up again and the Court can pass on it; for that reason I delay it.

THE COURT. The Court will pass on that as it arises.

COUNSEL FOR DEFENDANT. We didn't know what the character of testimony would be, and, therefore, it was impossible to foresee.

53 THE COURT. We will pass on that when it comes up.

I have not done any work for anyone in El Paso, other than Mr. Thorman, to the extent of earning a living; I have done small odd jobs, not on the basis of making a living.

It is hard to say how I occupy my time, hunting for jobs on occasions, and staying at home. I don't do much of anything at home as a rule. I have gotten out a little set of plan books and I work on them and have attempted to sell them; that is the extent, not to the extent of making a living at it. I don't mean plans for houses—little sketches, something I can take to people and sell. I have tried to sell them. They are sketches of buildings, houses. It is something I have gotten together. I have done odd jobs for builders and contractors in El Paso whenever I can get them, all the way from drawing a show case, for instance, to a whole building, complete building, but it is small jobs. I have never worked as superintendent of construction in this town. I have never tried to work at that kind of work, superintendent of construction.

Q. Have you ever tried to do any other kind of work except work along the lines of your training as a draftsman, architectural?

A. I haven't been able to get anything. I have applied for other jobs, but that is as far as I got.

Q. Have you tried to get your job back with any of these firms you used to work for, such as Fitzhugh, in Phoenix, and what was the name of the firm in Kansas City?

A. J. C. Nichols Company.

Q. Have you ever tried to get your job back with either of those firms, either in Phoenix or Kansas City, since you left them?

54 A. I was sent to this particular climate for my health and it is impossible for me to go back to that territory.

Q. For your health?

A. For my ears, not my health, my ears. I have made trips back there. I made one in 1931 to Kansas City and South Dakota. I visited with J. C. Nichols Company when I was there in 1931. I didn't ask them for my old job back. I went to South Dakota also in 1931. It was a visit. I was not necessarily visiting relatives. I have no relatives in Kansas City.

THE COURT. The Court is informed by counsel for plaintiff that he would like for the plaintiff to stand aside and put another witness on the stand; there being no objection on the part of the government, this witness may retire from the stand. It is understood counsel for the government, when he wants to finish, may resume the cross-examination after the witness has testified; the plaintiff will be back upon the stand for further cross-examination.

[Witness stands aside.]

O. H. THORMAN, a witness for plaintiff, being duly sworn, testified as follows:

On direct examination: My name is O. H. Thorman and I am an architect. I have been following that business about thirty years. I have been in that profession in the City of El Paso twenty-two years. I know the plaintiff in this case, Ray Keith Atkinson. He worked for me a short while in 1929; I think March and May. He is a draftsman, and he was working for me as such. I noticed something concerning his ability to hear and understand during the time he was working for me. He is very hard of hearing. He is a good
55 draftsman, and at that time I tried him out for one month, and I had to let him go; it was too inconvenient to converse with him. I had to write down quite a bit of the conversation for him; and I tried him out again a month later and finally had to let him go. I couldn't use him at all on account of his hearing. He is a very good draftsman, and that is the only objection I had. I just couldn't use him for that reason. That was the reason I let him go.

On cross-examination:

Q. Mr. Thorman, you say he was hard of hearing at that time and you had difficulty in making him understand instructions, is that correct?

A. Well, it wasn't that so much. I had to write down quite a few of the instructions, but whenever a client came in, he couldn't converse with the client. I don't remember whether Mr. Atkinson wore an ear phone at that time. He couldn't hear an ordinary conversation such as I observed here this morning; we had to talk very loud. I don't remember whether he wore an ear phone; I doubt if he did; he may have, but I doubt if he did; I am not sure. I just know we had to talk loud. We got up next to his ear to talk to him. You had to talk so loud to him it disturbed everybody else in the office. Well, I don't remember whether I put my lips or mouth up close to his ear on the side of his head. No; I didn't get out where he could look at me. I had to get close to him. In other words, you had to get up and shout in his ear for him to hear

you. That was in March 1929, and I think after about a month of absence I tried him again, the second time, and I think I gave him work to take home with him; that didn't work out, and I had to let him go. I put somebody in his place.

56 The work of a draftsman is to follow up any outline; that is, on building-construction work, drawing plans. He would copy from a sketch in my office. I made the sketch myself and he would copy it off and make what we call a working drawing of it. As to how long it would take a man to make one of those drawings from a sketch would depend on the nature of the building. If a small building, he could probably make it in a day or two. On big work we keep men on a building probably two or three months on one job. You have to give instructions constantly, all along. It is hard to say how often you would have to give instructions in drawing plans on a residence; it depends on the nature of the job. It is hard to say how many times a day; I might have to talk a half hour at one time and might not talk again for a couple of hours. Just now I don't have any draftsmen in my office. In 1929 I had five. The change occurred in 1932. If I have five men, I am with them almost constantly, or I put one man in charge to take care of the rest, for the purpose of instructing them what to do. That would have to be the customary procedure in an architect's office.

(Witness excused.)

Whereupon, court adjourned until two o'clock P. M. on May 2nd, 1934, at which time defendant asked leave to file a trial amendment; thereupon the jury was retired and counsel for defendant argued said application, at the conclusion of which counsel for plaintiff made the following objections to the filing of the trial amendment:

Colloquy

COUNSEL FOR PLAINTIFF. Your Honor, we object to the filing of the trial amendment. In the first place, it is not timely, because the government records would show that Mr. Atkinson's hearing, defect in hearing, was a matter that was noted when he was taken into the army, and I take it counsel has the record so showing. It is

57 undisputed in the evidence that they did examine him and examine his ears and put him on limited service on that account when he went into the army; in the next place, I say that the trial amendment is subject to general demurrer, and for that reason ought not to be allowed, for this reason, that under the War Risk Act any man who had ever had the War Risk Insurance was entitled at any time to reinstatement, provided he was not then totally and permanently disabled. I don't think Mr. Turner would controvert that proposition of law. We have had that matter up before, and it is specified in there that they may reinstate. Of course, the War Risk Insurance is done away with now, but as long as that Act was in force, they had a right to reinstate unless at the

time of the reinstatement or attempted reinstatement they were then totally and permanently disabled. In other words, we have had cases right here in this court where the man was drawing compensation for total temporary disability or maybe for seventy-five percent disability or fifty percent, and made his application to reinstate and was reinstated because, under the law, he was entitled as a matter of right to reinstate on paying up back premiums, unless at that time he was totally and permanently disabled. There is no evidence or allegation in the trial amendment that Mr. Atkinson was at that time, either in June 1921 or June 1927, totally and permanently disabled; there is no claim on our part he was totally and permanently disabled at either one of those dates; we say at some time after 1928 he became totally and permanently disabled; now we say for those reasons that the trial amendment isn't good; if he proved everything in there, it wouldn't be any defense to any issue in this case; and, furthermore, we say that what he is setting up there is wholly immaterial; the application to reinstate, which he tried to introduce this morning and which was excluded, says, "Have you ever been treated for any disease of brain
or nerves, throat or lungs, heart or blood vessels, stomach,
58 liver, intestines, kidney or bladder, genitourinary organs,
skin, bones, glands, ear or eye?" now, whether he had been treated or not for any of those things is immaterial here, because, as I say, he had an absolute unqualified right to reinstate, provided he was not then totally and permanently disabled, and there is no allegation in any of the pleadings by the government or by the plaintiff, and no evidence tending to show, that he was totally and permanently disabled on any of those dates; in fact, it is admitted in plaintiff's petition, under oath, that he was not totally and permanently disabled until some time after 1928, and the government, of course, has filed a general denial, which puts in issue whether or not he became totally and permanently disabled after that date.

(Thereupon, after further argument of counsel, the Court made the following ruling:)

THE COURT. The Court will allow the filing of the trial amendment in this case. When the evidence is in, the Court will control what the law is, but the Court will not deprive the Government of an opportunity to develop the facts. Are you ready to proceed?

COUNSEL FOR DEFENDANT. We will now renew our offer of the application for reinstatement, as to the matter which was stated therein, for the purpose of showing misrepresentation.

THE COURT. What does counsel for the plaintiff say with reference to granting leave to file the trial amendment; are you ready to proceed?

COUNSEL FOR PLAINTIFF. We would like to except. In view of Mr. Turner's statement, we think the trial amendment would be wholly immaterial and would form no basis for defense.

THE COURT. The Court will control that when the testimony is all in.

59 COUNSEL FOR PLAINTIFF. We would like to ask for a few minutes further recess to discuss the matter with our client.

(Whereupon a recess was taken, after which time the jury was recalled and the following proceedings were had:)

THE COURT. The trial amendment may now be presented to the Court and jury, and the Court will permit counsel for the plaintiff to generally outline, and the stenographer may take down, the response of the plaintiff and reduce it to writing.

(Whereupon the trial amendment was read to the Court and jury by counsel for defendant.)

COUNSEL FOR PLAINTIFF. If the Court please, the plaintiff, with leave of the Court later to have it written up and filed, makes the following reply to the trial amendment filed by the Government and says that in making application for reinstatement of War Risk Term Insurance in June 1921, the plaintiff used a form, No. 742, provided in printing by the Bureau of War Risk Insurance; that on one side of that form were certain questions, all of which were answered by plaintiff, that or he reverse side were several other questions to be answered by plaintiff, and the balance of the second sheet of that form prescribed by the Government contained what is called a "Medical Examiner's Report", which was required to be filled in by the medical examiner before the Government would act on the application for reinstatement of the plaintiff——

COUNSEL FOR DEFENDANT. We object to counsel testifying as to that report of examination, it is not in evidence and has not been offered as yet, we think it is improper in any event for him to testify about it.

THE COURT. I understand counsel is stating his pleadings,

60 an answer, as part of the form, in a certain medical examination made out, which accompanied this application for reinstatement made by the plaintiff as of date June 10th, 1921. Very well, you may proceed.

COUNSEL FOR DEFENDANT. We think that would be a conclusion.

THE COURT. He is stating what the form was and what it provided. Very well, if that is an exception, you demur to that, the Court will overrule it.

COUNSEL FOR PLAINTIFF. That on the reverse side of that form was a heading "Medical Examiner's Report", and it is requested that the report be filled in, giving answers to the questions which were asked by some medical examiner; that, in this instance, the medical examiner was A. W. Hyde, a doctor of Brookings, South Dakota; that, among other questions put to him on the reverse side of this form was Question No. 19, reading as follows: "After an examination do you find any abnormality of the lungs—" and then several others, among which is the ear, and the answer is yes, then another question, No. 22, in the medical examiner's report was: "Any defects

in the sight or hearing?" The answer is "Right ear 20/40"; that, after both sides of this form were filled in, the same was sent in to the Bureau at Washington and was approved and reinstatement took place; that plaintiff, by oversight, answered no to Question No. 10, regarding whether he had ever been treated for any disease of the ear, but had no intention to deceive and, as a matter of fact, at that time had not been treated for any disease of his ear, however, his ear had been examined and some defect found to exist in his hearing; furthermore that at the time of his entrance into the service, it was noted on the government records that there was then existing a defect in his hearing, and he was put on limited service on that account; furthermore that, under the law, plaintiff, regardless of any defect of hearing, or otherwise, had a right, as a
61 matter of law, to reinstate his War Risk Insurance provided, at the time he sought to reinstate it, he was not totally and permanently disabled, and he does not claim, and has never claimed, that he was totally and permanently disabled at any time prior to January 1928; and furthermore that, with reference to the statement made in the application for conversion, dated May 21, 1927, on form No. 739, the form prescribed by the Bureau in printing, with questions on one side and instructions and information on the other, plaintiff answered "Are you now disabled on account of injury or disease?" "No", and that in doing so, he had no intention to deceive, that, as a matter of fact, he did not deceive the Government, because it had full notice and knowledge, by reason of Dr. Hyde's statement made in June 1921, which was part of its records, that there was a defect in hearing to the extent of 20/40 and that the hearing was abnormal, and no question was asked in the application for conversion, in 1927, as to any defect of hearing; that plaintiff understood the question "Are you now disabled on account of injury or disease" to mean what it required about and he made a truthful answer thereto, that he was not disabled on account of any injury or disease at that time.

COUNSEL FOR DEFENDANT. If the Court please, as I understand it, our objection and exception to counsel's statement in reply to the trial amendment that it contains legal conclusions will be allowed as to the whole of this statement; is that correct? We want to reserve an exception as to the whole of his statement involving a legal conclusion.

THE COURT. Yes. Are you interposing a general demurrer or special exceptions to the paragraphs? The Court will overrule them. You may note an exception.

COUNSEL FOR DEFENDANT. We would like a demurrer as well as an exception.

62 THE COURT. Put in the record whatever you want and go on.

COUNSEL FOR DEFENDANT. I do demur to counsel's statement and specially except to it for the reason that it contains legal conclusions, that counsel for the government had not been presented with any formal answer to the trial amendment, written answer, and had no opportunity to examine it.

THE COURT. Just a moment on that. Do you wish this matter to be held up; you heard it; do you wish this trial to be held up until it is written out? I will not give you an exception on that ground; we will wait until it is written. The Court asked you gentlemen in Chambers if the Court should grant leave to file the government's trial amendment, whether counsel for the plaintiff would then be permitted to answer orally, make his statement of his answer orally, with the understanding that it could be reduced to writing later, and the Court understood counsel to state that would be satisfactory. Now, counsel may take any exception to that just the same as if it was written. That is just as good as if it were written out. If you want to renew and urge some additional one in writing, the Court will give you the privilege.

COUNSEL FOR DEFENDANT. We just take our exception to the pleading as such.

THE COURT. The Court is earnestly endeavoring to protect the rights of the plaintiff and government and have a full development of all material matters in this case so in one trial it may be properly disposed of and make some dispatch.

COUNSEL FOR DEFENDANT. I didn't mean to except to the ruling of the Court in permitting counsel to state it, but the point is, not having had an opportunity to know what it was, I couldn't state the exception until he had.

63 THE COURT. You heard it. Now, the Court is ruling on your exception to what he said. Now, if this answer is written out and it embodies something not embraced in this oral statement made here, you will have no opportunity to except to that; but if it embodies what is stated here, its legal effect, why, there will be no further exceptions.

COUNSEL FOR PLAINTIFF. To save any exceptions, I will ask the stenographer to write it up, and I will file exactly what she writes up as the answer and not change it in any way.

COUNSEL FOR DEFENDANT. We will then state our exceptions, after that is written, more fully.

THE COURT. Yes; the Court will rule on that. The plaintiff was on the stand for further cross-examination, the Court will say at this time that if counsel for the plaintiff, due to the granting of leave to the government to file a trial amendment and your answer thereto, desires to further examine this witness on direct, that may be done at this time, and then turn him over on cross-examination, and the cross-examination completed by counsel for the government on the pleadings as they now stand.

RAY KEITH ATKINSON, Plaintiff, having been called for further Direct Examination, testified as follows:

On direct examination: While I was in the service, I was examined by an army doctor. He examined my ears.

Q. Did he find anything wrong with them?

A. Yes.

COUNSEL FOR DEFENDANT. What the doctor found wrong would be hearsay.

THE COURT. Sustain the objection.

64 COUNSEL FOR PLAINTIFF. I will withdraw the question.

I couldn't say that it was exactly trouble I was having with my hearing during that period; the defect was there.

I recall that in 1921 I had an examination by Dr. Hyde in South Dakota. He examined my ears at that time.

I recall making application for this converted policy in May 1927. In making answers to questions asked on the government forms, respecting this insurance, either respecting the War Risk Insurance or the converted insurance, I attempted absolutely to answer to the best of my knowledge and information.

Q. Did you have any intention to deceive the government?

A. No, sir.

COUNSEL FOR DEFENDANT. If the Court please, we object to that because it is a conclusion peculiarly within the knowledge of the plaintiff.

THE COURT. I will overrule that objection. Where there is a charge of fraudulent intent, a statement with intent to deceive, the rule of evidence permits the party who is charged with the wrongful intent to deceive to state what his intentions were at the time.

COUNSEL FOR DEFENDANT. I think the instrument would be the best evidence.

THE COURT. Overrule the objection.

COUNSEL FOR DEFENDANT. Note our exception.

COUNSEL FOR PLAINTIFF. The instrument is here; I can't examine him until you introduce it. I will have to terminate that part of the examination now.

In the winter of 1928 I suffered unusually with colds. It was in 1928 that I came West. At the time of this spell of colds, I had

65 a continuation of colds at that time, and after they were over, my hearing was never as good as it was before; in other words, it is considerably worse. As far as I know, it has been getting worse ever since.

Q. Do I talk in too loud a tone, or had you rather I would talk lower; could you hear better lower?

A. No. Your tone has been all right. I can hear Mr. Turner better than Mr. Worrell; Mr. Turner's tone is considerably better. I did not have this ear phone when I was with Mr. Thorman. I had used one before, when I was in California.

Q. Now, just explain to the Court and jury why you dislike to use that ear phone.

COUNSEL FOR DEFENDANT. I don't think that is material, whether he likes or dislikes it. I think it is irrelevant and incompetent; the only thing is whether or not it could improve his hearing; that is the only materiality.

THE COURT. It appears to the Court, as suggested, that it is immaterial; he may state how much he has used it, and when he used it.

Q. I will withdraw the question and put it this way: I am trying to get at a different matter; it is not a question of his desire or like or dislike. Mr. Atkinson, I will ask you whether or not you have found that the wearing of this ear phone is an impediment or hindrance in obtaining employment?

COUNSEL FOR DEFENDANT. I think that calls for a conclusion of the witness.

THE COURT. The Court sustains the objection; it would be a conclusion upon his part.

Q. I will ask you this question, have you ever succeeded in obtaining employment when you went up to obtain it with this ear phone?

66 A. I am sorry, I didn't get all of that.

Q. I say, have you ever succeeded in getting a job when you went up to apply for it wearing your ear phone?

A. No; I never have.

COUNSEL FOR DEFENDANT. I think that is likewise immaterial and argumentative and is getting the same thing in a different way. I am certain the question is argumentative, to say the least.

THE COURT. Overrule the objection.

COUNSEL FOR DEFENDANT. Note our exception.

At the time I got employment in Tucson and at the time I got employment with Mr. Thorman here, I was not wearing my ear phone when I applied for those jobs.

My ear tires quickly when I am listening to talk for a considerable length of time. As to what the sensation is and how it affects me when I listen to talk a long time—I will say I have pain and fatigue; that is the only way I can describe it.

Q. That is not the same kind of pain and fatigue you used to get from talk before you lost your hearing?

COUNSEL FOR DEFENDANT. We object to leading and suggestive question.

THE COURT. Sustain the objection.

Q. I will ask you whether or not it is the same sort of pain or fatigue that you might have experienced before you lost your hearing?

A. I never experienced any pain and fatigue before I lost my hearing.

THE COURT. The witness is passed for further cross-examination.

67 On cross examination: The first time I wore an ear phone was when I wore one for a period of a month in 1928, I think. That was not when I was employed with the Nichols Company in Kansas City. That was when I was looking for a job in California.

No; I have not continued to wear an ear phone since then; there is a space in between. I wore one a few months in California in 1928, and there is space in there, it wasn't continuous. After that interruption, I can't say for sure when I began wearing it again; I think it was in 1931. I didn't wear an ear phone from 1929 until 1931. I have kept on wearing it continuously since 1931.

I have an automobile. I drive it down town here in El Paso in traffic. I have always driven an automobile during the past six, eight, or ten years; I have kept that up continuously. I don't use the ear phone when I drive. I just go ahead and drive without it when I drive a car.

This ear phone that I am wearing now is called a "Sonotone." This is the microphone [indicating] and it is turned off and on at this particular point; this is the receiver and this is the battery right here. When I said the microphone—that is what is on my chest. I have my finger on that part that goes into my ear now; that is the receiver. That is an electric wire back of my ear that is connected with the battery and the transmitter. In this case, I do not have an instrument in back of my ear on the mastoid. I never wear an additional help on the mastoid, in addition to the ear phone I have now, and wear it at the same time I wear the ear phone; I never tried that. The "Sonotone" Corporation makes this ear phone. This is the second ear phone that I have had since 1931. The other was the same thing as this.

The one I wore in 1928 was a different make. It worked on
68 the same principle. It is hard to say which was the more satisfactory, the other make or this one, because there was a difference in the hearing in those periods. I really think that this is the better machine, although it is not as expensive as the other.

Q. Now, Mr. Atkinson, as a matter of fact, you have a hereditary tendency to this loss of hearing?

COUNSEL FOR PLAINTIFF. We object on the ground that it would be immaterial whether he did or not; it would be a conclusion and immaterial.

THE COURT. Sustain the objection. It can be inquired into as to the extent of his impairment of hearing, when it commenced and all of the facts with reference to that; the question asked there calls for a conclusion.

COUNSEL FOR DEFENDANT. If the Court please, I will state this, we may want to make an offer of proof on that and may not, I don't know, but I will announce to the Court later on that.

I quit teaching school in 1923. No; I can't say that I quit that occupation because of my loss of hearing. I tried to go back to it after that; it was two years ago—1931—or a year ago, I don't recall. I tried here locally, through this territory.

I can't say that I have noticed any improvement in my hearing since I came West; it has been growing continually worse, but there has been a great improvement in my general health.

Q. But there has been no substantial change for the better in your hearing; if anything, it has been a change for the worse since you came West; is that correct? We are talking about your hearing, not about anything else.

A. It is pretty hard for me to say that, since I hit a place
69 where I can't hear the average voice, since four or five years ago, it is hard for me to tell just the condition. When I could hear a word or so in a conversation, I could tell whether my hearing was better; when I hit a place where I couldn't it is hard to say whether it is better or worse. I have to go to medical records, since I have completely lost my hearing, I don't know how bad it is, I can't say.

Q. Mr. Atkinson, I hand you here a paper (Ex. "B") and will ask you to examine it and state whether you executed it and signed it?

A. I didn't get everything you said.

Q. I am handing you a paper now, and I will ask you to examine it and state whether or not you executed and signed that paper. You don't have to read the whole paper; just state whether or not you executed that.

A. Yes; that is my signature.

COUNSEL FOR DEFENDANT. I offer this paper in evidence for the sole purpose of showing the question and answer to No. 18, which is set out in the trial amendment.

COUNSEL FOR PLAINTIFF. We object to that on the ground that it is immaterial to any issue in the case. This was on the form prescribed by the government, and there is no answer made there that would defeat in any way the suit we are trying.

THE COURT. Overrule the objection.

COUNSEL FOR PLAINTIFF. We except.

COUNSEL FOR DEFENDANT. This is Form 739, "Application for Conversion to U. S. Government Life Insurance", which the plaintiff has identified as having been signed by him; the date is May 21st, 1927, Kansas City, Missouri; the form up here is headed "United
70 States Veterans' Bureau, Insurance Division"; and the portion that is offered by the defendant is question No. 18 and the answer as follows: "Are you now disabled on account of injury or disease?" Answer, "No."

Exhibit "B", from which there was introduced in evidence only Question No. 18 and the answer thereto, as shown on said exhibit, is as follows:

EXHIBIT "B"

United States Veterans' Bureau, Insurance Division. Form 739—Rev. Jan., 1927.

Application for conversion to U. S. Government life insurance: In Accordance with the Provisions of the World War Veterans' Act, 1924, and Bureau Regulations.

Use Ink and Make Separate Application for Each Plan of Insurance Applied for.

Serial number K 634242.

1. My name in full: First, Ray; Middle, Keith; Last name, Atkinson.

2. Home address: Number, Street, or rural route, 6205 Olive; County, city, town, or post office, Kansas City; State, Missouri. Mailing Address: 6205 Olive, Kansas City, Missouri.

3. I was born at: City, town, or post office, Wilmot; State, S. Dak.; Day of month, 5th; Month, Feb.; Year, 1896; Age, nearest birthday, 31.

71 4. Weight, 140; Heights, 5 ft. 8 in.; Color of hair, Dark Brown; Color of eyes, Brown.

5. Race and nationality, White-English.

6. Rank and organization at time of discharge (Rank, grade, rating), Private; (Organization, regiment, station, ship, etc.), Med. Dept. Camp Greenleaf, Ga. Dates of enlistments, Sept. 30, 1918; Dates of discharges, Dec. 26, 1918.

7. Amount of War Risk Term Insurance, $10,000.

8. Last month for which term premium was paid: May.

9. Monthly term premium paid: $6.90.

10. Certificate number: 4110844.

11. I apply for $10,000 U. S. Government Life Insurance on the Following Plan (Make cross mark X under plan selected):

Ordinary Life.	20-Pay Life.	30-Pay Life.	5 yr. Convertible Term.
			X

20-yr. Endowment.	30-yr. Endowment.	Endowment at age 62.

12. I will Pay Premiums as Indicated Below (Make cross mark X under method selected):

Monthly.	Quarterly.	Semiannually.	Annually.
X			
$7.20	$------	$------	$------

If the applicant herein be entitled to this insurance under the World War Veterans' Act, 1924, and regulations made thereunder, this insurance shall be considered as granted and shall become effective as follows: On the first of the month succeeding the date of this application provided the premium on an equal amount of

72 Yearly Renewable Term Insurance, payable on the first of the current month, has been paid. If, however, the premium on an equal amount of Yearly Renewable Term Insurance, payable on the first of the current month, has not been paid, then the converted insurance shall take effect on the first of the current month; but in no event shall the converted insurance take effect until the first premium thereon has been paid.

Only beneficiaries of insurance hereby converted should be named on this form. (See reverse side for permitted class of beneficiaries.)

13. Relationship to me.	Name of beneficiary. (If married woman, her own first and middle name and husband's last name must be stated.)	Amt. of Ins. for each beneficiary.	P. O. address (a) No. and street. (b) City, town, or post office.
Wife------	Esther C. Atkinson	$6,500---	6205 Olive, Kansas City, Mo.
Mother----	Ella V. Atkinson--	$3,500---	6205 Olive, Kansas City, Mo.

1. In addition to the converted insurance above applied for I wish to retain $------ yearly renewable term insurance. (If any change of beneficiary of Term Insurance is desired, separate request therefor must be made.)

15. I select the option indicated by cross mark X below (See reverse side for instructions): No. 1 (X) one sum. No. 2 ( ) payable in ------ limited installments. No. 3 ( ) continuous installments.

16. Have you ever made application for Government compensation or pension? No.

17. If so, state when and give your claim number, -------.

18. Are you now disabled on account of injury or disease? No.

73 19. The applicant must remit with this application a sum not less than the amount of the first premium on the converted insurance applied for.

I inclose herewith remittance payable to the Treasurer of the United States by Draft, Money order, Check, in the amount of $7.20 to cover the first monthly premium on the converted insurance.

Signed at Kansas City, Mo., on the 21st day of May 1927.

(Sgd.) RAY K. ATKINSON.

(Applicant sign here. Do not print signature.)

Witnessed by (Sgd.) Geo. H. Hough, Notary; address 5741 Prospect.

(On the face of said application appear the following pencil notations: "No K No C V J 5/31.") (Page 2.)

OPTIONAL SETTLEMENTS OF UNITED STATES GOVERNMENT LIFE INSURANCE (CONVERTED INSURANCE) AT DEATH

These features do not apply to the term (wartime) insurance.

The Insured may select one of the optional settlements set forth below, but notice of the selection shall not be valid unless and until it is recorded in the United States Veterans Bureau. The Insured may revoke his selection of the optional settlement, but the revocation shall not be valid unless and until it is recorded in the United States Veterans' Bureau. If the Insured does not select one of said optional settlements, then he shall be deemed to have made no election and the insurance shall be payable in two hundred and forty monthly installments, unless an election under option 2 or 3 is made by the beneficiary.

If the Insured has not made an optional selection at the maturity of this policy by death a designated beneficiary or beneficiaries may select settlement under options 2 or 3 as set forth below, but the selection shall not be valid unless and until it is recorded in the United States Veterans Bureau. If the Insured has made an
74 optional selection at the maturity of this policy by death, a designated beneficiary may elect to receive such insurance in installments spread over a greater period of time than that selected by the Insured.

The values shown in the following options are based on an insurance of $1,000 without indebtedness. If there is indebtedness, or the Insured has received any payments on account of total permanent disability, the values will be decreased accordingly. If the policy provides for a larger amount of insurance than $1,000, the values will be increased proportionately.

OPTIONAL SETTLEMENTS IN LIEU OF MONTHLY INSTALLMENTS OF $5.75 PAYABLE ON THE DEATH OF THE INSURED UNDER THE TERMS OF THE POLICY

Option 1. Insurance payable in one sum: Settlement under this option will be made only when selected by the Insured during his lifetime or by his last will and testament. When such selection has been made the face amount will be payable in one sum at the maturity of the policy by death.

Option 2. Insurance payable in limited installments: The installments noted below will be payable for an agreed number of months (not less than 36) to the designated beneficiary, but if such beneficiary dies before the agreed number of monthly installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions of the policy.

Number of monthly installments	36	48	60	72
Amount of monthly installment for each $1,000 of insurance	$29.19	$22.27	$18.12	$15.35
Number of monthly installments	84	96	108	120
Amount of monthly installment for each $1,000 of insurance	$13.38	$11.90	$10.75	$9.83
Number of monthly installments	180	192	204	216
Amount of monthly installment for each $1,000 of insurance	$7.10	$6.76	$6.47	$6.20
Number of monthly installments	228	240		
Amount of monthly installment for each $1,000 of insurance	$5.97	$5.75		

75 Option 3. Insurance payable in continuous installments: The installments noted below will be payable throughout the lifetime of the designated beneficiary, but if the designated beneficiary dies before 240 such installments have been paid the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions of the policy.

Age of beneficiary at time of death of insured	Amount of monthly installments for each $1,000 of insurance	Age of beneficiary at time of death of insured	Amount of monthly installments for each $1,000 of insurance	Age of beneficiary at time of death of insured	Amount of monthly installments for each $1,000 of insurance
10	$3.67	32	$4.18	54	$5.29
11	3.69	33	4.22	55	5.35
12	3.70	34	4.26	56	5.39
13	3.72	35	4.30	57	5.44
14	3.73	36	4.34	58	5.48
15	3.75	37	4.38	59	5.53
16	3.77	38	4.43	60	5.56
17	3.78	39	4.48	61	5.60
18	3.80	40	4.52	62	5.63
19	3.82	41	4.57	63	5.65
20	3.84	42	4.63	64	5.68
21	3.87	43	4.68	65	5.70
22	3.89	44	4.73	66	5.71
23	3.91	45	4.79	67	5.73
24	3.94	46	4.84	68	5.74
25	3.96	47	4.90	69	5.74
26	3.99	48	4.96	70	5.75
27	4.02	49	5.01	71	5.75
28	4.05	50	5.07	72	5.75
29	4.08	51	5.13	73	5.75
30	4.11	52	5.19	74	5.75
31	4.15	53	5.24	75	5.75

76 THE PERMITTED CLASS OF BENEFICIARIES

The permitted class of beneficiaries include spouse, child, grandchild, parent, brother, sister, uncle, aunt, nephew, niece, brother-in-law, and sister-in-law.

Term	Definition
Spouse	Wife or husband of the insured.
Child	A legitimate child. An illegitimate child, but as to the father only if acknowledged in writing signed by him, or if he has been judicially ordered or decreed to contribute to such child's support, or has been judicially decreed to be the putative father of such child. A child legally adopted. A stepchild, if a member of insured's household.

Term	Definition	
Grandchild	A child as above defined of a child as above defined.	
Parent	Father, grandfather, father through adoption, Mother, grandmother, mother through adoption, Step-father, step-mother.	Either of the insured or of the spouse, but as to the spouse, only provided the spouse, or issue of the insured and spouse are living.
Brother or Sister	A person who has stood in loco parentis to the insured at any time prior to his enlistment or induction, for a period of not less than one year. This relationship must have begun during the minority of the insured. Brother and sister of the half blood as well as those of the whole blood, step-brother and stepsister; brother and sister through adoption; also the children of a person who stood in loco parentis as above defined to the insured, or another member of the same household as to whom such person during such period likewise stood in loco parentis.	
Uncle or Aunt	Blood brother or sister of either natural parent of the insured.	
Nephew or Niece	Blood son or daughter of blood related brother or sister of the insured.	
Brother-in-Law Sister-in-Law	Blood brother of spouse, or husband of blood sister of the insured, Blood sister of spouse, or or wife of blood brother of the insured.	Provided blood relative or issue of blood relative and spouse are living.

77

Section 303 of the World War Veteran's Act, 1924, provides in part as follows:

"If no person within the permitted class of beneficiaries survive the insured, or if before the completion of payments the beneficiary or beneficiaries shall die and there be no surviving person within said permitted class, then there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable under the provisions of this title: Provided, That in cases where the estate of the insured would escheat under the laws of the place of his residence the insured shall not be paid to the estate of the in-

sured, but shall escheat to the United States and shall be credited to the United States Government life-insurance fund or the military and naval insurance appropriation, as may be proper."

COUNSEL FOR DEFENDANT. If the Court please, Mr. Atkinson identified this morning the other document (Ex. "A"); I don't think it necessary to go through it again. I will state I renew the offer of that paper, Form 742, for the sole purpose of showing the representation made in answer to question No. 10 on that form.

The COURT. What is the date of that?

COUNSEL FOR DEFENDANT. June 10th, 1921.

COUNSEL FOR PLAINTIFF. We object to that on the grounds stated this morning when it was offered, and on the further ground
78 that the answer is immaterial to any issue in this case, and as a matter of law he had a right to reinstate, provided he was not totally and permanently disabled; there is no claim made by anyone that he was totally and permanently disabled in June 1921; and, further, we object because it is improper to introduce one question or one part of the writing without introducing the entire writing; that an isolated question would be wholly immaterial and incompetent.

The COURT. Overrule the objection.

COUNSEL FOR PLAINTIFF. We except.

COUNSEL FOR DEFENDANT. This was identified by Mr. Atkinson this morning: For the purposes of the record and information of the jury, I will state briefly this is headed "Treasury Department, Bureau of War Risk Insurance, Insurance Division, Form 742. Application for Reinstatement of War Risk Term Insurance" executed by Mrs. Atkinson, according to his testimony, on June 10th, 1921. Question No. 10 is as follows: "Have you ever been treated for any disease of . . ."—incidentally, I will leave out all of these immaterial diseases here; there are a number of deases, including "ear or eye?" The answer to the inquiry about the eye or ear is "No."

I will state this; that the offer as made this morning of the application for reinstatement on June 10th, 1921, contained some additional questions, which I would like to offer at this time.

COUNSEL FOR PLAINTIFF. We object to that on the same grounds; it is immaterial.

The COURT. Well, the records may show counsel for plaintiff stated on the grounds previously made to the question and answer, and consider the exception. Overrule the objection and exception.

79 COUNSEL FOR DEFENDANT. Question No. 16 reads as follows: "Have you been in any accident or suffered any injury since lapse of this insurance?" Answer: "No." Question No. 18 reads as follows: "Have you consulted a physician or any one in regard to your health since lapse of this insurance?" Answer: "No."

The application for reinstatement, Exhibit "A", from which Questions 10, 16, and 18 and the answers thereto were read by counsel for defendant, no other part of said form having been offered in evidence, is as follows:

EXHIBIT "A"

Treasury Department, Bureau of War Risk Insurance, Insurance Division. Form 742.—Revised Feb. 1921.

Application for reinstatement of war risk term insurance: Part one.—Application for Reinstatement and Statement of Health.

The following request for reinstatement must be filled out and signed by the applicant in all cases:

1. Amount of insurance originally carried: $10,000.
2. Month of lapse: Dec. 26, 1921.
3. Insurance to be reinstated by this application: $10,000.
4. Monthly premium on reinstated insurance: $6.50.
5. Term insurance certificate number: T-4110844.
6. My name in full: First, Ray; middle, Keith; last, Atkinson.
7. Home address: (Street or rural route); (County, city, town, or post office), Brookings; (State), S. Dak.

80 8. Rank, grade, or rating at time of applying for War Risk term insurance: Private.

9. Organization, regiment, station, ship, etc., at time of applying for term insurance: Co. 15, Jefferson, Br'k's, Mo.

10. Serial number: 3780179.

11. Date of discharge: Mo., Dec. 26, 1918.

12. I hereby apply for the reinstatement of $10,000 insurance granted to me under the provisions of the War Risk Insurance Act which has now lapsed because I failed to pay the premium since Dec. 26, 1918, or within the grace period of 31 days. As a condition to the reinstatement of this insurance, I do hereby certify that I am now in good health.

12a. Answer yes or no to question (a) or (b) according to the facts in the case:

(a) Was your present (injury) (disease) incurred while in the active military or naval service during the World War?

(b) Is your present (injury) (disease) the result of (injury) (disease) suffered or contracted while in the active military or naval service during the World War? ------

13. Have you ever made application for Government compensation or pension? No.

14. If so, state when and where filed and for what disability.

15. Give your claim number, if any. ------

16. Have you been in any accident or suffered injury since lapse of this insurance? If so, state full particulars, date, name, and address of attending physician. No.

17. Have you lost an eye, arm or hand, leg or foot? ------

18. Have you consulted a physician or any one in regard to your health since lapse of this insurance? If so, state full particulars, date, name, and address of doctor. No.

81 19. It is agreed that the effective date of the term insurance, if reinstated, shall be the first day of the month in which the requirements have been complied with, unless the applicant requests the Bureau in writing that the effective date shall be the first day of the following month. I desire this reinstatement to be effective (check below): _____ The first day of the month in which the requirements have been complied with, or , X The first day of the following month.

20. Signed at Brookings, S. D., on this the 10th day of June 1921.

(Sgd.) Ray K. Atkinson,
(Signature of applicant.)

Witness:
(Sgd.) N. L. Dodds.

21. Premiums tendered with application:

(a) For the grace period	$6.50
(b) Reinstatement of term insurance for the month of _____	6.50
(c) In advance on $_____ continued term insurance	
(d) For first payment on $_____ Government (converted) insurance	
Remitted by (check) (draft) (M. O.) Total	13.50

PART TWO.—SHORT MEDICAL CERTIFICATE. This certificate must be executed by a physician if application is made after the insurance has lapsed three months and before the expiration of six months (including the month for which the unpaid premium was due). Medical certificate at applicant's expense.

1. Is applicant's appearance healthy?

2. State pulse rate: (a) Before exercise _____; (b) After exercise _____; (c) Two minutes after exercise _____; (d) Does it intermit? _____; (e) Is it regular? _____

3. Age _____; Height _____; Weight _____

82 4. Do you find indication of disease (describe fully): (a) Of heart or blood vessels? ____; (b) Of respiratory organs? _____; (c) Of abdominal or pelvic organs? _____; (d) Of nervous system? _____

5. Do you find applicant free from physical and mental defects and in good health? _____

6. Have you reason to suspect intemperate habits or immoral life? _____

7. Do you unqualifiedly recommend acceptance of the risk? _____

8. I do hereby certify that the applicant is personally known to me, that I made the foregoing (part two examination at my office (or home), and the answers to the questions and statements made are in

my own handwriting. Examination made and certificate signed on ------ day of ----, 19--

---

(Signature of Physician.)

(Home address, including street and number.)

(*Name of State in which you are licensed to practice medicine.*)

(On the face of the Application the following stamps appear: "5—6-18-5"; "reinstatement complete"; "6-13-21 $13.00 paid to include month of July 1921"; "account received c/o $13.00 (illegible) is different from inclosure mentioned"; pencil notation "10,000 6-50 6-607-1"; pencil notation "A U 6-23-21.")

(Page 2.)

PART THREE.—FULL MEDICAL EXAMINATION. The following medical examination must be furnished if application for reinstatement is made after the insurance has lapsed six months, including the month for which the unpaid premium was due. Medical examination at applicant's expense.

83 1. Date of birth: Feb. 5th, 1896.

2. Place of birth: Wilmot, S. Dak.

3. Race: Caucasian.

4. Single, married, or widowed.

5.

Family record	Age if living	Health good or bad (if not good, give full details)	Age at death	Cause of death	Year of death
Father			45	Typhoid fever.	1903
Mother	50	Good.			
Sister	0				
Brother	0				

6. What operations have you had? Give dates. None.

7. Have you ever used wines or liquors to excess? No.

8. Have you ever used opium, morphine, cocaine, or other habit-forming drugs? No.

9. What is your occupation? Teacher.

10. Have you ever been treated for any disease of brain or nerves, no; throat or lungs, no; heart or blood vessels, no; stomach, liver, intestines, no; kidney or bladder, no; genitourinary organs, no; skin, no; bones, no; glands, no; ear or eye, no? (Answer "Yes" or "No" by each. If "Yes", describe fully and give date.) ------

11. Signed by applicant in the presence of medical examiner on this 10th day of June 1921.

(Signed) A. W. HYDE, (Signed) RAY K. ATKINSON,
(Signature of medical examiner.) (Signature of applicant.)

MEDICAL EXAMINER'S REPORT

12. Height in shoes: 5 ft. 9 in.

13. Weight, coat and vest off. Est. ------ lbs., or weighing: 137 lbs.

14. Girth of chest, normal, 30 in.; forced expiration, 31 in.; forced inspiration, 35 in.

15. Girth of abdomen, 29 in.

84 16. State pulse rate: (a) Before exercise, 72; (b) immediately after exercise, 84; (c) one minute after exercise, 72; (d) two minutes after exercise, 72.

17. Blood pressure (see note): Systolic, 125; Diastolic, 90. Instrument used ------.

18. Any irregularity or atheroma? No.

19. After an examination do you find any abnormality of the lungs, no; heart, no; nervous system, no; skin, no; ear, yes; eye, no; abdomen, no; or digestive system ------? (Answer "Yes" or "No" by each. If "Yes," describe fully.) ------

20. Urinalysis: Specific gravity, 1024; Albumin, no; test used, Hellers Reaction acid. Sugar, no; test used, Hanes. Have you knowledge that the urine examined was passed by the applicant at the time of examination? ------

21. Has applicant ever had syphilis, gout, or rheumatism? No.

22. Any defect in the sight or hearing? Right ear, 20/40.

23. Any deformity or departure from normal in any respect? No.

24. Has the applicant lost an eye, hand or arm, foot or leg? No.

25. Is the ability to work impaired in any way? If so, state particulars. No.

26. Do you unqualifiedly recommend acceptance of the risk: 1st cl. risk, yes; fair risk, ------; poor risk, ------.

27. Females: Any history or uterine or ovarian diseases? ------. Date of last confinement? Was it normal? ------. Married: If pregnant, month advanced, ------. Number of miscarriages, if any, and dates, ------.

85 28. Are you related to applicant by blood or marriage? No.

29. Was this examination made at your home or office, or at applicant's home? State place and address. Office.

30. Are answers to questions of medical examiner's report in your own handwriting? Yes.

31. Are you satisfied that everything has been fully stated regarding the physical condition, habits, personal and family history of the applicant? Yes.

32. Remarks: He teaches manual training; ear does not hinder.

Examination made and signed 10th day of June 1921.

(Signed) A. W. Hyde,
(Signature.)

Name of State in which you are licensed to practice medicine: South Dakota.

NOTES.—Blood pressure is required (a) when applicant is more than thirty years of age, (b) in all cases where there is a family history of apoplexy, heart disease, or nephritis, or where there is a personal history of gout, rheumatism, syphilis, heart disease, or any evidence of kidney disease.

Section 25 of the War Risk Insurance Act provides that "Whoever . . . makes any statement of a material fact knowing it to be false shall be guilty of perjury and shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both."

(On each side of page two, appear the following: "This medical examination is not to be delivered to the applicant, but must be returned to the Bureau by the physician," On the face of page two appears stamp reading: "Approved Date 6–17–21 Insurance Medical Section By (Signed) H. L. Mann.")

On redirect examination:

Q. Mr. Atkinson, referring to the application to reinstate the
86 War Risk Insurance, I will ask you whether any part of the writing on that, other than your signature, is in your handwriting? Look on both sides of it.

COUNSEL FOR DEFENDANT. If the Court please, we object to that, as to any matter above his signature on that form; there are two portions; one is the plaintiff's statement and the other is the physician's report as to any matter relating to the plaintiff's statement above Mr. Atkinson's signature, we object to the question, because it is immaterial whose handwriting it was in, whether his or someone else's.

THE COURT. Let me see the statement; I can't tell. That is my signature on that paper; and then on the back of it I signed it again.

Q. Is there any other part on either side in your handwriting?

COUNSEL FOR DEFENDANT. We renew the same objection to that.

THE COURT. Let me see it (handed to Court). This instrument is headed "Application for Reinstatement of War Risk Term Insurance", and is in four divisions; the first is designated "Part One. Application for Reinstatement and Statement of Health", that bears his signature; Part Two is designated "Short Medical Certificate"; Part Three is designated "Full Medical Examination", that bears his signature; and then one division designated "Medical Examiner's Report." Now, the witness may be asked whether the portion of the instrument, Part One, that bears his signature is in his handwriting, the same as to Part Three.

COUNSEL FOR DEFENDANT. Note our exception to the Court's ruling for the reasons stated.

I can't recall whether any part of Part One of this applica-
87 tion for reinstatement, on the first page, is in my handwriting, other than my signature; I don't recall what my printing was at that time; I can't identify the printing; I don't know. That date and the amount and all that may be my writing; I can't tell; that is

quite awhile ago; I recognize my signature perfectly all right; it is pretty hard for me to say. I can't say with any degree of accuracy whether the dates and figures in that Part One are in my handwriting or not. With reference to Part Three, headed "Full Medical Examination", the signature is the only thing in my handwriting.

THE COURT. You may have the same objection and same ruling of the Court.

COUNSEL FOR PLAINTIFF. Now, Your Honor, we want to offer from the reverse side of that instrument, what is styled "Medical Examiner's Report", Question No. 19, reading: "After an examination do you find——"

COUNSEL FOR DEFENDANT. Wait a minute; what question?

COUNSEL FOR PLAINTIFF. No. 19.

COUNSEL FOR DEFENDANT. If the Court please, we object to reading before the jury what is on that paper before it is admitted in evidence; the Court hasn't ruled on that.

COUNSEL FOR PLAINTIFF. We want Questions 19 and 22.

COUNSEL FOR DEFENDANT. Now, if the Court please, those questions are a part of the medical examiner's report and we object to their admission in evidence, or to any part of the medical examiner's report, because it has not been identified in the manner required by law; there is no showing that the examiner himself is not available and it has not been certified to as an official record, and is hearsay and immaterial under the pleadings.

88 THE COURT. The document comes from the possession of the government, the defendant has referred to sections of it and sections have been offered in evidence by counsel for defendant, and the Court will overrule the objection.

COUNSEL FOR DEFENDANT. Note our exception for the reasons stated.

COUNSEL FOR PLAINTIFF. Question 19 reads: "After an examination do you find any abnormality of the lungs, no; heart, no; nervous system, no; skin, no; ear, yes; eye, no; abdomen, no; or digestive system ——?" Question 22 reads: "Any defect in the sight or hearing? Right ear 20/40." We offer also the date of that, June 10th, 1921, and the signature of A. W. Hyde, and the stamp reading: "Approved; Date, 6-17-21; Insurance Medical Section, By (signed) H. L. Mann."

As I stated this morning, the first time I ever had any treatment for my ears was in Kansas City. That was some sort of electrical treatment.

Q. You had never had any treatments by Dr. Hyde or anybody else before that treatment in Kansas City, had you?

COUNSEL FOR DEFENDANT. We object to the leading question.

Q. I will withdraw that and ask this question: State whether or not you had ever had any treatment for your ears before you were treated by Dr. Roberts in Kansas City?

A. I wouldn't say the same type; I had my ears looked at considerably, but never anything like Dr. Roberts performed.

Q. Then you had had your ears examined but not treated?

A. I think that would be what it really is.

THE COURT. That question is suggestive and argumentative.

89 COUNSEL FOR DEFENDANT. We object. We move the Court to instruct the jury to disregard the answer.

THE COURT. You will disregard the last question asked and answer made because of the fact that the question in form was leading and suggestive.

Q. State whether, before the time Dr. Roberts treated you in Kansas City, you had ever had any attention from a physician for your ears, other than to examine them?

A. Well, they examined the ears and cleaned them, and put solution in my throat, things like that; whether that was examination or treatment, why, I don't know.

Q. We will ask the doctor. Now, this application for conversion, Question 18 has been introduced, showing the question, "Are you now disabled on account of injury or disease?" And the answer "No." Is that in your handwriting, that "no"?

COUNSEL FOR DEFENDANT. We object to that for the same reason.

THE COURT. He testified, I believe, that that portion was not in his handwriting except his signature.

COUNSEL FOR PLAINTIFF. This is a different instrument; this is the application for conversion and the other was the reinstatement application.

THE COURT. Let me see that (handed to Court). Overrule the objection.

COUNSEL FOR DEFENDANT. Note our exception.

That answer "No" to Question 18 looks like my printing. However, at that time I would answer that no, whether that is my writing or not.

Q. Was that your honest belief at that time?

A. I was drawing $200.00 a month at that time——

90 COUNSEL FOR DEFENDANT. We object to that because it is an attempt to vary a written instrument introduced in evidence.

THE COURT. Sustain the objection to that particular question asked and the form.

Q. In making the answer to that question please state whether you intended to deceive or defraud the government.

COUNSEL FOR DEFENDANT. We object to that, Your Honor.

THE COURT. Overrule the objection.

A. No fraud intended. At that time I had a job, I was earning approximately $200.00 a month, and I had been earning that quite a while and I intended to earn it for quite a while longer.

COUNSEL FOR DEFENDANT. We object to the answer because not responsive, first, and, secondly, because he is testifying as to legal conclusion—he said there was no fraud.

THE COURT. It is not a question of fraud but question of intent; the Court overrules the objection on that ground. Of course, a lot of his answer is voluntary, about what he was earning and all that kind of thing. "No fraud intended", that portion will be left in the record; the rest is stricken out as not responsive.

Q. In making answers to the questions in both those instruments the application for reinstatement of War Risk Insurance and the application to convert to government life insurance, I will ask you to state whether or not you had any intent to deceive or defraud the government by any answer you made?

A. Not intentionally.

91 COUNSEL FOR DEFENDANT. Renew the objection.

THE COURT. The same ruling; overrule the objection. It has already been answered.

My answer was not intentionally. This is the form of receipt I have been obtaining when I paid my monthly premium on this insurance (referring to receipt). This particular one happens to be for March 1934. I have kept those paid up regularly ever since I took the converted policy out, paid every month. I have paid for the month of May, being the payment made on the 28th of April, I testified to.

COUNSEL FOR PLAINTIFF. I want to introduce that.

COUNSEL FOR DEFENDANT. No objection.

COUNSEL FOR PLAINTIFF. To show the form. There is no use to offer the others.

THE COURT. The witness has already testified he had receipts for all payments except the last.

Whereupon said receipt was received in evidence, marked "Plf's Ex. 6", and is in words and figures as follows, to wit:

EXHIBIT 6

Veterans' Administration, Washington, D. C., United States Government Life Insurance, Insurance Form 789, Rev. Sept. 1931, Monthly Premium.

Your account has been credited with the Monthly Premium described below, due on the first day of the month indicated.

Premium, $7.70; Policy number, K-634242; Due date, Mar. 1934.

M. 962, Ray K. Atkinson, 4604 Pershing Dr., El Paso, Tex.

FRANK T. HINES,
Administrator.

92 Not valid unless stamped and countersigned for the Director of Insurance, nor until the remittance credited, if tendered by check or draft, is honored on presentation for payment.

Stamp reading: "Countersigned at Washington, D. C., H. L. McCoy, Director of Insurance, D. B. L." (File mark on reverse side.)

On recross-examination:

Q. Mr. Atkinson, can you hear me now?

A. Are you talking to me?

Q. Can you hear me now?

A. I can hear you talking, but I don't hear it.

Q. (Getting closer). Well, can you hear me now?

A. Yes.

Dr. Hyde was a physician in private practice in Brookings, South Dakota, at the time I went to him in 1919. He was also a physician in private practice at the time I went to him in 1921, on June 10th. He was not in a government office there that I know of. As far a I know, he was a private physician, engaged in private practice at Brookings. He was my physician before that time.

Q. Do you know how many times you had been to him before you went before him on June 10th, 1921?

A. Every time I had measles or whooping cough or anything through that period.

COUNSEL FOR PLAINTIFF. We object; it is immaterial to anything in the record. We ask that the last question and answer be stricken out.

THE COURT. The Court will hear from counsel for the government on the materiality of the testimony.

COUNSEL FOR DEFENDANT. I will withdraw it; I won't insist on it.

93 THE COURT. The question and answer is withdrawn and stricken out, and the jury will disregard it.

COUNSEL FOR PLAINTIFF. We overlooked introducing a rider continuing this policy in force five more years.

COUNSEL FOR DEFENDANT. We offer no objection. That is for the purpose, as I understand, of showing the policy was continued after June 1932?

COUNSEL FOR PLAINTIFF. That is all, its five-year term.

COUNSEL FOR DEFENDANT. No objection.

THE COURT. Very well.

Whereupon said rider was received in evidence, marked "Plf.'s Ex. 7" and is in words and figures as follows, to wit:

EXHIBIT 7

United States Government Life Insurance, Certificate of Renewal, Five-year Level Premium Term Insurance: Age of Insured, 36; Amount of Insurance, $10,000.00; Monthly, $7.70; Quarterly, $23.00; Semiannual, $45.90; Annual, $91.00.

Pursuant to the provisions of the amendment approved June 24, 1932, to Section 301 of the World War Veterans' Act, 1924, as amended, and in consideration of the payment of the monthly pre-

mium (at the rate for the attained age of insured, 36) in the amount of $7.70 on the first day of each month for a period of sixty months, the insurance in the amount of $10,000.00 under Policy No. K634242, of which this agreement becomes a part, is renewed as five-year level premium term insurance for the period beginning June 1, 1932, and ending May 31, 1937.

94 The insurance hereby renewed is subject to the conditions, benefits, and privileges contained in the policy except that the nonforfeiture provisions (paragraph 5) and the table of guaranteed surrender values (paragraph 6) on the second page of the policy shall be null and void from and after the date of this certificate. This insurance ceases on the 31st day of May 1937, and no further premium will be payable unless the insurance has been exchanged for some other plan of insurance on or before that date.

Effective as of the 1st day of June 1932.

FRANK T. HINES,
Administrator of Veterans' Affairs.

Countersigned at Washington, D. C. Examined and issued Sept. 14, 1932.

(Signed) J. F. LITTLE,
Registrar.

Veterans' Administration, Insurance Form 745.

On the reverse side stamp reading: "Filed May 2, 1934 (El Paso Division), D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, By (Signed) Flora L. Linker, Deputy Clerk."

Dr. W. E. VANDEVERE, a witness for Plaintiff, being duly sworn, testified as follows:

On direct examination: My name is W. E. Vandevere. I am a practicing physician at this time. I am a graduate of an accredited medical college, the University of Colorado.

I specialized in the study of eye, ear, nose, and throat for two years in New Orleans, at the Eye, Ear, Nose, and Throat Hospital. I have a license to practice in the State of Texas. I have been practicing since 1917, and in El Paso since 1919.

I know Ray Keith Atkinson, the plaintiff in this case, and
95 have had occasion to examine him. I don't remember whether the first examination was made at your request or not. I have examined him twice. The first examination was in March 1933 and the last examination was on the 26th of last month, April 26th, 1934.

As to the kind of examination I made of Mr. Atkinson—well, when he came in he complained or said that he couldn't hear; that his hearing had been gradually failing for the past several years, and I examined him, looking in the ears. Both ear drums were retracted or drawn inward, and calcinous or lime deposits were seen in each ear drum, more marked in the right ear drum. The low notes of the tuning forks weren't heard in the right ear, and only very slightly in the left, by the Weber test, lateralized to the left; that is where you put the tuning fork in the center of the head and see which ear heard best in the audiogram. The last examination showed a marked defect

of hearing in both ears, all notes gradually reduced until the higher notes weren't heard at all. My diagnosis of the defect in hearing is what is known as "chronic progressive deafness", sometimes called "otosclerosis"; it means the same thing.

There has been a very slight decrease in the ability to hear during the period between the first examination I made about a year ago and this last examination last month. There is absolutely no cure for the condition that Mr. Atkinson is suffering from. I think it is just a question of time until he is absolutely deaf.

Q. Now, do you mean by absolutely deaf that there will be no recording of sound whatever through the ears?

A. Well, it is hardly likely he will ever get to where it will be impossible to make him hear anything, but he will be so deaf that even with his ear phones, I don't think he will be able to hear anything—that is, an ordinary conversation.

96 His condition at the present time is such that, without the ear phone or any artificial stimulation, he cannot hear ordinary conversation. By coming close to him and shouting loudly, he can hear a word or two, but to carry on any conversation with him without his ear phones—it would be impossible to do that.

Ear phones work on the principle like a loud-speaker of a radio, and they have an electric battery—that is, the type he uses—and it is just an instrument that magnifies sound. There are a number of hearing instruments; the "Sonotone" is a more recent development, where instead of placing the ear piece in the ear there *in* an attachment that goes back of the ear and stimulates the sound through the bone more than through the ear canal itself. I know the instrument that Mr. Atkinson uses. That is an instrument worked on the principle of vibration or magnifying of sound. With either type of instrument there is a vibration that sets up through the structures of the ear and bone that helps to magnify the sound he receives. All sound is perceived by a mixture of the two—that is, by aid and bone conduction.

Without the use of this ear phone, Mr. Atkinson has no practical use of his hearing. From the facts that I know and from my own examination and studying of this case, I am sure that his present condition will continue throughout the rest of Mr. Atkinson's life. The first time that I examined Mr. Atkinson was March 27th, 1933.

Q. Now, Dr. Vandevere, suppose that this plaintiff for several years—well, from and after the date of his discharge back in 1918—was carrying on, working part of the time as a school teacher, up to about 1923, and then after that as an employee in the architectural business, as a draftsman and tracer; that during that period of

97 time, up until the fall or winter of 1927 and '28, fall of '28. he was able to carry on and did carry on, earning during the latter years, say, the last three years, up to 1928. approximately $200.00 a month as an architectural employee in the drafting or tracing department; that during the winter and spring of 1927 and '28

he had a series of bad colds; that about July 1928 he came West, went out to the West Coast and stayed for some six or eight months, then came to Phoenix, Arizona, and stayed there for a limited time, some two or three months; that at Phoenix, Arizona, he worked for an architectural concern and earned about $500.00 or $600.00 over a period of a few months, then he came to El Paso, and in 1929 he was employed for about two months with Mr. O. H. Thorman, an architect here in El Paso; that after about a month with Mr. Thorman he was discharged because of his inability to hear and carry on conversations requisite in that business; that shortly after that he was given employment again by Mr. Thorman, with the same result, that he was discharged because of his hearing. Now, taking into consideration those facts and taking into consideration what you know of your own personal knowledge of this case from examinations made by you, excluding any history that Mr. Atkinson might have given you at the time of those examinations, and further bearing in mind that the definition of total and permanent disability is as follows: "Any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render is reasonably certain that the total disability will continue throughout the life of the disabled person", now, Doctor, from the facts stated in that definition of total and permanent disability, and from your own
98 personal knowledge of this case, are you able to form an opinion as to whether or not the plaintiff is totally and permanently disabled?

A. I feel sure that he is.

COUNSEL FOR DEFENDANT. We object, that isn't responsive; answer yes or no; anything else we object to at this time.

Q. Can you answer that yes or no?

A. Yes.

Q. Now, Doctor, in your opinion, is the plaintiff at this time totally and permanently disabled?

COUNSEL FOR DEFENDANT. If the Court please, we object to that question for the reason that it calls for a conclusion upon the ultimate issue to be determined by the jury in this case, therefore, it invades the province of the Court and jury, and contains a mixed question of fact and law; and we further object to it for the reason that, it being hypothetically put, it doesn't contain all of the evidence that has been adduced here and we point out particularly that it does not contain a statement to the effect that this plaintiff can, by the use of a mechanical device, hear, hear practically an ordinary conversation; and we object further for the reason that under the pleadings in this case, it is immaterial whether or not the plaintiff is permanently and totally disabled at this this.

THE COURT. What do you mean?

COUNSEL FOR DEFENDANT. I mean by that, Your Honor, that the pleadings are limited to the time of the filing of the claim, the claim of his total and permanent disability.

THE COURT. The Court will hear from counsel on the last objection urged.

COUNSEL FOR PLAINTIFF. I think I can change the form of the question so that it will eliminate the objection. I will withdraw the last question and ask it another way.

99 Q. Now, Doctor, bearing in mind the facts that I have stated, bearing in mind the facts that you have gained from your personal observation and examination of this plaintiff, bearing in mind the definition of total and permanent disability given you, are you able to form an opinion as to whether or not the plaintiff was totally and permanently disabled at any time between January 1st, 1928, and December 10th, 1932?

A. I think——

COUNSEL FOR DEFENDANT. Answer the question yes or no.

A. Yes.

Q. Now, Doctor, what is that opinion?

COUNSEL FOR DEFENDANT. If the Court please, we renew and make the same objection to that question. If the Court requires us to do so, I will restate it, as to the ultimate issue and the objection being worded as worded in the former objection, and further that it does not contain a statement that the plaintiff can hear practically an ordinary conversation produced by a mechanical device.

THE COURT. Overrule the objection.

COUNSEL FOR DEFENDANT. Note our exception.

Q. Can you answer the question?

A. Repeat it.

Q. Bearing in mind the facts that I have stated, bearing in mind the facts that you have gained from your personal observation and examination of this plaintiff, bearing in mind the definition of total and permanent disability given you, are you able to form an opinion as to whether or not the plaintiff was totally and permanently disabled at any time between January 1st, 1928, and December 10th, 1932?

100 A. I am.

Q. Will you give that opinion, Doctor?

COUNSEL FOR DEFENDANT. That is the same one objected to, and the Court has overruled the objection and exception is taken.

A. I think it must have been several years, this condition that he is in now; he has been practically in this condition, practically this deaf, I am sure, for at least four or five years before my examination a year ago, as shown by this examination recently; a year's duration there has been very slight decrease. This type of hearing defect is a slowly progressive type, and I think that it must have been of several years' duration.

COUNSEL FOR DEFENDANT. I think the comment of the Doctor is not responsive to the question; the question was, was he or not totally and permanently disabled, as I understand, and his reasons would be a different question.

THE COURT. Overrule the objection.

COUNSEL FOR DEFENDANT. Note our exception.

Q. Then, Doctor, are you able to form an opinion as to the probable date of total and permanent disability?

COUNSEL FOR DEFENDANT. We want to say that our objection goes to all of this line of testimony on the ultimate issue in the case and involving any hypothetical set of facts. I will not jump up every time, if the Court will allow it.

THE COURT. The Court will overrule the objection to the last question.

A. I think this man has been in practically the same condition for several years; at least four or five years.

101 Q. Doctor, I will ask you this question, bearing in mind these things that I have stated to you: are you able to form an opinion as to whether this plaintiff was totally and permanently disabled on December 10th, 1932?

A. Yes.

Q. Will you state whether or not, Doctor, in your opinion, he was totally and permanently disabled on December 10th, 1932?

COUNSEL FOR DEFENDANT. We object to that question, first, because it is leading, and, second, for the same reasons we objected to the former.

THE COURT. Sustain the objection on the first ground that it is leading and suggestive.

Bearing in mind these facts that you have stated to me, I am able to form an opinion as to whether or not this plaintiff had lost all practical use of his hearing on December 10th, 1932. I think that he had lost all useful hearing at that date.

Q. Now, Doctor, bearing in mind these facts that I have detailed to you and your personal knowledge of this case, are you able to form an opinion as to how long before December 10th, 1932, he had become so totally and permanently disabled?

COUNSEL FOR DEFENDANT. He has not answered the question as to total and permanent disability yet. As I understand, his answer to that question as worded is based on the assumption that he has answered that question one way or the other; we renew the objection, anyhow, for the same reasons stated before.

COUNSEL FOR PLAINTIFF. To save any controversy over it, I will withdraw the question and put in a different manner.

102 Bearing in mind those facts, I am able to form an opinion as to whether or not the plaintiff had lost all practical use of his hearing between January 1st, 1928, and December 10th, 1932. I think he had lost all practical use of his hearing during that period. It would be impossible to give the approximate date.

On cross-examination: I said that my diagnosis of this condition was otosclerosis, or chronic progressive deafness, as generally known. It is the same thing. As to what the incidents of that condition are, do you mean how often does this condition occur? I didn't quite understand the question. Ordinarily, with a person suffering from otosclerosis, both sounds are diminished, both high and low.

Q. Ordinarily, of course, air conduction is decreased, depending on the degree of otosclerosis; ordinarily bone conduction is increased in the case of otosclerosis?

A. It is in the early stages; later on both are decreased.

It is true that a man hears, whether he hears by bone conduction or air conduction, or both, if he hears at all. He may hear by bone conduction and have no air conduction at all. If a man has the sense of hearing no matter which means it is even though one of those two is eliminated, he still hears, but he doesn't hear ordinary conversation through the bone as much as he does through the air. As a specialist, I understand that hearing is a sense; that is one thing, and the ear is another. The ear is but an agent of the sense. There are other agents of that sense, too, besides the ear; there is the brain and the nerve, the auditory nerve. Yes; there are artificial agents, also. A man still has bone conduction when he hears by ear phones; ordinarily that is the method; it may be both; it may be the ear
103 phone merely augments the sound, enlarges the sound, increases the sound, and part is transferred through the bone and part through the air. With this devise that Mr. Atkinson wears, I don't think he has any attachment back of the ear, I think just the plug in the ear. Of course, some goes through the bone that way. As to whether most bone conduction, or at least a large part of it, comes back of the ear, I will say some of it does. If he had an attachment on the back of his ear his hearing might and might not be increased; sometimes it is and sometimes I have had patients with this attachment on the mastoid bone who couldn't hear anything and would have to go back to the attachment in the ear. I don't know what condition that would be. If you had bone conduction, anything that would increase that bone conduction would add to his hearing. One of those attachments that go on the mastoid might increase bone conduction in certain cases. The reason you wouldn't in other cases is that it may be the nerve is so near dead. As to that not being a case of otosclerosis—well, in otosclerosis you have a combination of middle-ear changes, inflam'atory changes, as well as internal ear, which affects the nerve.

It is true that when the nerve is gone, it doesn't make any difference how good air conduction and bone conduction is, he couldn't hear. The nerves are partly destroyed in this case, in otosclerosis they are partly destroyed. That is not because of nonuse, but because of the pathological condition of the internal ear, in that bone pressing on the nerves, which tends to destroy the nerve fibers of the auditory nerve, the nerve of hearing. If a man can hear by a

natural agency supplemented by an artificial agency, he hasn't lost the use of that nerve, but for practical purposes, he may have.

I never examined Mr. Atkinson with his ear phone on except to talk to him; I didn't examine him with the audiometer, I did examine him in ordinary conversation. I didn't examine him with the
104 customary devices we doctors use, at a time when he had on his ear phone, except in conversational voice, and don't know the degree of hearing he has with that ear phone, as determined by by these usual and customary tests, except in conversation with him.

When you go to examine a man for an ear condition, the degree of hearing is not something which you must rely entirely upon the statements of the man to determine if you use the audiometer. With this audiometer, the patient's back is turned to the machine, he is given a button to press when he hears a sound, we increase from very low until he presses that button, which indicates he hears that sound, the lowest pitch he hears that; that is repeated several times, and if each time he presses the button at approximately the same place, we know he is giving us the right answer, we can absolutely check up with the audiometer test. We test each ear separately with the audiometer. He has this receiver, very much like a telephone receiver, he holds it to one ear and after we finish that, we test the other, what goes in this ear over this receiver isn't received in the opposite ear with the audiometer, it is an electrical device, similar to the way we intensify the tones with a radio, and we can absolutely check that up to where we know we are correct.

I got the history of this case from Mr. Atkinson when he came in the first time. The second time I took the old history. I got the history by talking to him, he had on his ear phones. I had to raise my voice a little in talking to him. The first examination was in March 1933.

Q. You say he gave you a history of impaired hearing for several years?

A. He said that since he was ten years of age, he had had some defect of hearing. The government test was 8–20. ------.

COUNSEL FOR PLAINTIFF. We object to the government test, it would be immaterial.

105 THE COURT. Sustain the objection.

He gave me a history as to impaired hearing since he was ten years of age. He said it had been gradually growing worse for the past several years; he didn't say how many.

I didn't ask him under what conditions he heard best, whether in a noisy or quite place, or what. As a rule, in a noisy place, these people can hear better than in a quiet place. I think it would be more likely that that is true when he didn't have his ear phone, because with the ear phone all sounds are so magnified, I think it would make such confusion of noises he would have difficulty in hearing speech, spoken words.

Q. In otosclerosis hearing devices can be used successfully in most cases, can they not?

COUNSEL FOR PLAINTIFF. We object to that as calling for a conclusion. Asking whether they can be used successfully, that covers a pretty broad field.

THE COURT. Well, the witness is an expert. I suppose he would know whether he can answer the question or not.

COUNSEL FOR PLAINTIFF. I don't know whether he means success in a vocation or hearing.

COUNSEL FOR DEFENDANT. We are talking about hearing.

THE COURT. Overrule the objection; answer if you can.

A. As long as there is a certain degree of hearing present the hearing device is beneficial, but they will eventually reach a stage where even with the best of hearing devices they have great difficulty in hearing.

106 Q. You said you had to shout into Mr. Atkinson's ear when he didn't have the ear phone on, but when you got the history you talked to him with only a slightly raised voice?

A. Through his ear phone.

Q. That demonstrates rather a remarkable success in the use of that instrument?

COUNSEL FOR PLAINTIFF. We object to the argument with the witness.

THE COURT. The Court sustains the objection to the form of the last question.

It would be impossible to give a percentage as to the increased hearing I observed by the use of this mechanical contrivance when I first examined Mr. Atkinson, but I think it would be practically doubled, you can say that. He could be made to hear without the device by shouting at him and up close to his ear; you could probably call it stone deaf for any practical purpose. He could hear a sound.

Q. Doctor, as a matter of fact, otosclerosis is a hereditary condition generally, isn't it?

COUNSEL FOR PLAINTIFF. We object to that as immaterial to any issue in this case.

THE COURT. I would like to hear from the government.

COUNSEL FOR DEFENDANT. We think it is material to show the character of disease, that condition that probably existed back there before 1921, taking into consideration, from the history of this case, as Dr. Vandevere has testified, and as appears otherwise in evidence, that he had impaired hearing since he was ten years old, or thereabouts, and I think it has some materiality.

THE COURT. Does counsel for the government assure the Court he will have testimony that it is absolutely hereditary?

107 COUNSEL FOR DEFENDANT. I don't know that it is absolutely.

THE COURT. You have an expert here.

COUNSEL FOR DEFENDANT. There will be evidence on that point. I think, as a matter of fact, it is, of course I can't say I can prove that.

THE COURT. Whether it is hereditary?

COUNSEL FOR DEFENDANT. I don't know whether it is or not.

Q. Doctor, is it hereditary?

A. No; it isn't.

COUNSEL FOR DEFENDANT. I will renew that other question.

COUNSEL FOR PLAINTIFF. Go ahead and ask it.

COUNSEL FOR DEFENDANT. We will withdraw it.

On redirect examination: As to one of those reports showing the right ear 20/40's, that means he hears at twenty feet what he should hear at forty feet. This audiometer is an electrical device. A man undergoing a test with that device could not fake on you if you make a repetition of each ear, as you likely do. In my opinion, Mr. Atkinson is not faking his deafness. I stated, in answer to Mr. Turner, that I believe Mr. Atkinson's hearing must be increased twice or double by this hearing device.

Q. Now, Doctor, from the facts stated to you as to what the evidence shows and from your own examination and knowledge of the case, state whether or not, in your opinion, at any time between January 1st, 1928, and December 1, 1932, the condition of Mr. Atkinson's hearing was such he could engage in a substantially gainful occupation.

108 COUNSEL FOR DEFENDANT. We object to that for the reason that it calls for a conclusion upon the issue which the jury is here to decide and also for the reason that there is no evidence here to show that the doctor was acquainted with all of the occupations that one might engage in, the duties, in other words, it would require something of a vocational expert as well as medical; it is a mixed question of fact and law.

THE COURT. You would have to renew the basis of the hypothetical question for it; it appears to the Court that would be too speculative without repeating the evidence.

COUNSEL FOR PLAINTIFF. I will withdraw it and put another question.

I do not believe that between January 1st, 1928, and December 1st, 1932, Mr. Atkinson has had any practical use of his hearing without the use of the phone. There is absolutely no treatment that you can give for his trouble. All types of treatment have been used, but generally they are wasting their time and money.

Whereupon court adjourned until 9:30 A. M. on May 3rd, 1934, at which time the following proceedings were had:

Dr. W. E. VANDEVERE, having been recalled by Plaintiff for further Redirect Examination, testified as follows:

On redirect examination: A series of colds often makes a condition like Mr. Atkinson has worse. Assuming that the evidence here shows that in 1927, on up until the fall of that year, Mr. Atkinson was working in an architect's office without any ear phone and was hard of hearing, but was able to hear his fellow workers when they would get close to him and raise their voices, then he began to have a series of colds through the winter and on up into 1928, and then that

109 he went to Phoenix, got a job in another architect's office out there, and that he could hardly hear when they would shout at him. I think that the colds which he had had during that winter would have caused the sudden change in his condition; that is very often the case, the hearing will get very much worse after a cold. As I stated yesterday, in my opinion, Mr. Atkinson has had no practical use of his sense of hearing without the phone for several years.

Mr. Atkinson's condition is just like a man that has lost his leg; he can get an artificial leg, cork leg, and still get around and be useful, but he has lost his leg just the same. I think it is very much the same kind of proposition; a man that has lost his leg can be given artificial legs so he can hobble around, get around, but it is not like having his own legs.

On recross-examination:

Q. Doctor, of course, you understand that hearing is a sense and legs aren't a sense at all; your illustration there would be changed accordingly?

A. It is a function, a function of the ear is to hear and a function of the leg is to help you to walk.

As to a comparison with the eye and the use of glasses . . . well, with the eye, for instance, you can lose your eye and put in an artificial eye; you still have an eye to all intents and purposes; you can hardly tell the difference. You have no vision. Many times it is true, when you have your glasses and don't break them or lose them, that if you have an eye there with a very limited vision, by the use of glasses you can raise that vision considerably; you still haven't lost the sense of sight, but if anything happens, it is too bad.

Q. If, as a matter of fact, in connection with the question which Mr. Morton asked you, there was no indication of a sudden change
110 for the worse in Mr. Atkinson's hearing following those colds in 1927 and '28, during that winter, then you would have to change your statement about the colds having anything to do with his present condition?

A. I don't know that it would necessarily have to be sudden change; very often colds will produce sudden change for the worse in any type of hearing defect. Colds more often cause decrease of hearing than any other, but any disease that lowers bodily resistance, especially colds, is likely to cause congestion in the ears; colds are more likely to cause decrease of hearing than almost any other disease.

(Witness excused.)

RAY KEITH ATKINSON, Plaintiff, having been recalled for further Redirect Examination, testified as follows:

I have been able to hear nothing that has gone on in the trial of this case but the questions you have asked. I haven't understood anything that the other witnesses have said or that the attorneys have said in arguing to the Court; the only thing that I know is what has been asked me directly. I haven't heard anything about the Court's rulings. All that I have heard is the questions that have been put to me on the witness stand.

After I sent in this application to reinstate the War Risk Insurance, in June 1921, it was reinstated. After that application, signed by Dr. Hyde and myself, was sent in, they did not make any further request in connection with the renewal or reinstatement and I was not examined. I sent that in and I got the reinstatement, as far as I know, that is all there was to it.

111 In 1927 I was working for some architects in Kansas City. At that time I did not use an ear phone. I was able to hear my employers and fellow employees when they spoke to me close up, in a loud tone of voice.

As I testified, I had a series of colds during that winter of 1927–1928; then I went out West and finally landed at Phoenix and got a job with some architects. When I was with those architects I could not hear nearly as good as I did in 1927 in Kansas City. My condition has been getting worse since I was in Phoenix.

Q. In Phoenix you did not have a phone, did you?

A. No.

COUNSEL FOR DEFENDANT. If the Court please, we object to counsel asking leading questions.

THE COURT. Counsel's questions are leading questions.

I did not use a phone at Phoenix. I was able to hear my employers or fellow employees when they spoke to me in a loud tone of voice, if very loud, but a lot of the instructions were given in writing.

On recross-examination: Throughout this trial I have been sitting at the rear end of the counsel table, about twenty-five or thirty feet from the witness stand and bench.

Q. Do you understand that the interrogations of you while you are on the stand have been made by counsel on both sides in only a slightly raised voice; is that your understanding of it?

A. I heard nothing that has been said other than what you have directed to me.

112 Q. That isn't the question, the question is this, do you understand that I am now speaking to you in only a slightly raised voice?

A. You wish to know what degree your voice is coming to me; is that what you are trying to get at? I don't understand your question.

Q. Well, do you understand about how loud I am talking?

A. It registers, yes; I can tell whether you are talking loud or whether you are talking low.

Every voice is different, your voice . . . I couldn't say whether your voice is natural, your voice, the way you are talking to me now, the way it registers, I couldn't say whether that is your natural voice or not. As to Mr. Worrell and Mr. Morton, it is my opinion, it seems to me that Mr. Worrell has to talk to me real loud, that is what it registers, it is hard for me to get his tone of voice; and Mr. Morton doesn't talk so loud, that is the way it registers, I seem to be getting it without him talking so loud, that is as near as I can describe it.

I also understand that the examinations that have been made have been conducted at a distance of from three to five feet from me.

None of these employers that I worked for had an opportunity to give me instructions at a time when I was using my ear phone.

On redirect examination: All of the testimony I have given in this case has been given in response to questions asked by the different attorneys, standing by me, next to the witness stand, within three or four feet of me. I have used my ear phone all the time during this trial . . . no; I beg pardon, I did not have my ear phone turned on all the time during this trial. I turn it on and off all the time; it
113 is a matter of habit, I can't tell just when I have it on and when I have it off. I turned it on and off to see if I could hear; when I found I couldn't hear, I turned it off, that is the way I describe it. I turn it off and on. The batteries are in my hip pocket, the phone is on my chest, and I have an ear attachment. I have had all that on during the course of this trial.

On recross examination:

Q. Mr. Atkinson, during a large part of the time, seated back at the counsel table, you haven't had that part of the phone that connects to your ear attached there and working, have you?

A. Well, I rest once in a while. I have tried in several different cases to see what I could hear and found I couldn't, and I switched it on and off.

I can't hear anything without the battery working. I would like to hear everything. I don't know whether I turn on the battery when I carry on a conversation and turn it off when I get through; you would have to check up on me; I can't tell you; that is a matter of habit; I wouldn't know when I turn it on and off. If I see something I want to hear, I turn it on.

On redirect examination: I feel a dozen times during any conversation to see whether it is on. It is absolutely an involuntary action. I don't know anything about it. Absolutely, I depend on lip reading some.

(Witness excused.)

COUNSEL FOR PLAINTIFF. If the Court please, at this time we offer the deposition of Dr. E. H. Grove, of Arlington, South Dakota.

Counsel for plaintiff read the following portions of the
114 deposition of Dr. E. H. GROVE, same being, in narrative form, as follows:

My name is E. H. Grove. Age fifty-eight. Residence, Arlington, South Dakota.

I am a physician. I was graduated from an accredited medical school, Northwestern University of Chicago. I am engaged in the practice of medicine and have been so engaged for twenty-nine years. I am engaged in general practice, both city and country.

In my professional capacity as a doctor, I have had experience in treating and diagnosing diseases of the ear and auditory system. The nature and extent of such experience is in the usual way of a general practitioner.

I am acquainted with Ray Keith Atkinson, plaintiff in the suit of Ray Keith Atkinson versus The United States of America, pending at El Paso, Texas. I have known him thirty years. I have had occasion to examine and treat the said plaintiff in my professional capacity. I first examined and treated the said plaintiff in my office, July 8th, 1925. I made a written record of said first examination; no treatment. Original office memorandum attached, marked "Exhibit A."

COUNSEL FOR PLAINTIFF. We will offer that.

Said memorandum being, in words and figures, as follows:

EXHIBIT A

Ray K. Atkinson Bal._____
No._____ Paid $1.50
Date July 8, 1925 Total_____
S. __ M. __ W. __ Sex__ Chg. 1.50
Age Nat. Occup. For'd_____
Visit Off. (√) Med. Self (√) Wife Son Dau.
Temp. Pulse Resp. B. P.
____A. M.
____P. M.
App. _____ Sleep_____ Bowels_____
Urine_____

115 Chief Complaint: Deafness for some time.

Remarks: Ex.-Rt. Ear: Found deafness quite marked; could not hear a watch tick close up. Could hear the voice when raised to a shout.

Left ear: Could hear ordinary conversation at about 1 foot. Could hear watch tick about 4 inches.

Diagnosis: Catarrh, Otitis, Media.

Services to Daily Call—X

I have an independent recollection of my examination independent of my written memorandum, but not of all the details. My written memorandum of said examination reflects the actual facts disclosed by said examination.

In my examination of said plaintiff at said time I covered the right ear and said numbers and gave conversation certain distances from the left ear; also used a watch tick at different distances from left ear. Then did the same into right ear, with left ear covered. My findings were: Right ear—a shout at close to make him hear. He could not hear a watch tick. Left ear—he could hear a conversation at one foot from ear; a watch tick at four inches from ear.

I again examined the plaintiff in my professional capacity on August 10th, 1931. I made a written record or memorandum of such examination. Original office memorandum attached, marked "exhibit B." The written record or memorandum of such other examination reflects the true findings made by me of such examination. I have a recollection of such other examination independent of the

written record or memorandum, but vague as to all details, except as refreshed by memorandum. A reference to such written record or memorandum brings back to mind such examination and the findings made thereon. In such examination I covered one ear and used conversation at different distances in the other ear; also watch tick at different distances. My findings were: Right ear—I had to shout close up and with difficulty made him hear. Left ear—could
116 not hear ordinary conversation at one-half foot; he could not hear watch tick with it against his ear. His hearing was not as good as a few years previous.

The deafness I found in my examination of Ray K. Atkinson in 1925 was much worse at the time of my second examination in 1931. As to the nature and degree of such change in plaintiff's condition, I can only repeat what I have said—that in the right ear in 1925 he could only be made to hear by raising the voice louder than ordinary conversation; in 1931 it was difficult to make him hear with a shout. The left ear; in 1925 he could hear ordinary conversation at one foot from ear; in 1931 he could not hear ordinary conversation at six inches from ear. My examination of Ray K. Atkinson's condition in 1931, relative to his deafness: His condition would be a decided handicap and detriment to him in securing and holding any substantially gainful and continuous employment.

Counsel for defendant read and offered in evidence the following portions of the deposition of said witness, Dr. E. H. Grove, the same being in narrative form, as follows:

Cross interrogatories: I am not a specialist in diseases of the ear. It is a fact that my practice has been general in nature and that I have never specialized in diseases of the ear. In my examination of the plaintiff, Ray Keith Atkinson, on or about July 8, 1925, I did not test plaintiff's ears with the Politzer Acoumeter, and I did not make the Weber test, the Schwabach test, the Rinne test, or the Gelle test, and I did not use tuning forks in examining plaintiff's ears. In my examination of plaintiff on or about the month of August 1931 none of such tests were made.

Otosclerosis is rarification of the capsule of the labyrinth
117 with ankylosis of the stapes. Otosclerosis does resemble a dry catarrhal middle ear; this is not a disease of the mucous membrane of the middle ear.

It is a fact that I have known the plaintiff, Ray Keith Atkinson, for fifteen years or more. It is not a fact that he has always been reasonably deaf ever since I have known him.

COUNSEL FOR PLAINTIFF. We would like to introduce, from the deposition of Edward W. Tanner, a witness for defendant, and the deposition taken by the defendant, the following portions.

Counsel for plaintiff read the following portions of the deposition of EDWARD W. TANNER, same being in narrative form, as follows:

ON DIRECT EXAMINATION (Questions by Mr. Willis, counsel for defendant): My name is Edward W. Tanner, and I live at 6410 Washington, Kansas City, Missouri. I am employed as an architect.

During my employment with the J. C. Nichols Investment Company as an architect, I was acquainted with Ray Keith Atkinson. He worked for the J. C. Nichols Investment Company. He started some time in 1924. I can't tell you exactly, but he stayed with us until some time in the summer of 1928. He was employed as an architectural draftsman by the J. C. Nichols Investment Company from some time in 1924 to some time in 1928.

While he was at work there I noticed that he had some apparent disability, he was considerably handicapped in his deafness. That is, he seemed to be quite deaf.

COUNSEL FOR PLAINTIFF. We would also like to introduce a portion of the deposition of M. H. Linscott, a witness for defendant, the deposition being taken by the defendant.

118 Counsel for plaintiff read the following portions of the deposition of M. H. LINSCOTT, same being, in narrative form, as follows:

On direct examination (Questions by Mr. Willis, counsel for defendant): My name is M. H. Linscott, and I live at 6143 Cherry, Kansas City, Missouri. I am employed by the J. C. Nichols Investment Company as an architectural draftsman.

Yes; I was acquainted with Mr. Ray Keith Atkinson. He worked on plans of store buildings principally, and some residences, for the J. C. Nichols Investment Company. As to whether I noticed any apparent disability that he had . . . I noticed that he was quite hard of hearing.

COUNSEL FOR PLAINTIFF. We would also like to introduce a portion of the deposition of Mr. Lee M. Fitzhugh, taken by the defendant.

Counsel for plaintiff read the following portions of the deposition of LEE M. FITZHUGH, same being, in narrative form, as follows:

On direct examination (Questions by Mr. Hammond, counsel for defendant): My name is L. M. Fitzhugh, and I am a resident of Phoenix. I am an architect and my office is located in the Ellis Building, Second Avenue and Monroe Street, Phoenix. I have been working at my profession twenty-eight years.

I have had occasion to meet Ray Keith Atkinson, the plaintiff in this case. He was employed by Fitzhugh and Byron as draftsman.

Mr. Atkinson suffered by reason of deafness while he was with me.

119 COUNSEL FOR PLAINTIFF. We offer Exhibits "A" and "B" attached to the deposition of Dr. Grove.

Exhibit "A" has been heretofore copied herein, and Exhibit "B" is, in words and figures, as follows, to wit:

EXHIBIT B

Ray K. Atkinson

Date, Aug. 10, 1931
S ---- M---- W ---- Sex ----
Age---- Nat------ Occup----
Visit Off. (√) Med. Self (√) Wife Son Dau.

Bal ----------
Paid----------
Total----------
Chg----------
For'd----------

Tem. Pulse Resp. B. P.

-------- A. M.
-------- P. M.
App. Sleep Bowels
Urine--------
Chief Complaint is deafness in both ears.
Remarks: As good as before.
Ex.: Hearing not better
Rt. ear: Had to shout into ear and he did not always hear.
Left Ear: He could hear ordinary conversation about 6 inches; also a watch against the ear.

COUNSEL FOR PLAINTIFF. We would like to read . . . consider the whole policy and the rider as read, with the right to refer to any part of it.

COUNSEL FOR DEFENDANT. Any part that is material.

THE COURT. The Court is under the impression that has already been offered.

COUNSEL FOR PLAINTIFF. We didn't read it. There is one portion here, in paragraph 11 (a): "Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both
120 ears, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability." Plaintiff now rests, Your Honor.

COUNSEL FOR DEFENDANT. The defendant offers the deposition of Dr. Sam E. Roberts, of Kansas City, Missouri.

Counsel for defendant read the following portions of the deposition of Dr. SAM E. ROBERTS, same being, in narrative form, as follows:

On direct examination (Questions by Mr. Willis, counsel for defendant):

My name is Sam E. Roberts. I am a specialist in ear, nose, and throat diseases. I live at 5964 Overhill Road, Mission Hills. It is on the Kansas side in Johnson County. That is a residential district south of Kansas City, Missouri.

I practice medicine at 1110 Professional Building, Kansas City, Missouri. I am a regularly licensed and practicing physician and surgeon, and I have specialized in ear, nose, and throat. As to my experience and training . . . I have done undergraduate work at

University of Kansas; eighteen months assistantship to Dr. Charles Caton; one year postgraduate work University of Vienna, Austria; teacher in the Department of Ear, Nose, and Throat Diseases, University of Kansas, for twenty years; head of Department for the last seven years; private and hospital practice for twenty years. I have been specializing exclusively in ear, nose, and throat conditions for twenty years.

I was acquainted with Ray Keith Atkinson, the plaintiff in this case. He consulted me regarding his ear; that is, he was a patient of mine. At the time he was a patient of mine I made a written memorandum concerning his case. They were made by me and made a part of my permanent records. I do have the original record with me that was made in this case of Mr. Ray Atkinson. This card record that I have was made at the time I examined Mr. Ray Atkinson. A short time ago a government representative called on me with reference to my findings and examination of Mr. Atkinson. At that time I made a copy of my records for him. I would like to keep my original records in this case.

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Mr. WILLIS. Please mark this card as Defendant's Exhibit A for identification.

COUNSEL FOR PLAINTIFF. We object to that.

COUNSEL FOR DEFENDANT. We haven't offered that in evidence yet.

The card which you now hold in your hand, and which has been marked by the reporter as Defendant's Exhibit A, the copy is identical with my original record.

The first time I saw Mr. Ray Atkinson professionally was December 11, 1926. I examined him at the time I saw him. As to what history he gave me and what he told me about his condition . . . on December 11, 1926, he told me that he had impaired hearing which began twenty years ago; parcusis, which means that the patient hears best when in a noisy place. There was no tinnitus, which means a ringing in the ears; no vertigo, which means dizziness. There were no other ear diseases. His past illnesses: Typhoid pneumonia at age of five. Family history——

COUNSEL FOR PLAINTIFF. We object to that, because in the first place, it is not responsive, and family history has no bearing on any issue in this case.

THE COURT. What was the question?

COUNSEL FOR DEFENDANT. What history did he give you? What did he tell you about his condition?

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THE COURT. The Court will exclude that portion embraced in brackets.

COUNSEL FOR DEFENDANT. Note our exception to the exclusion of that portion.

THE COURT. The court excludes that portion enclosed in parenthesis. (The portion excluded being as follows: "Family history: Father has slightly impaired hearing, not examined by me.")

Findings: Otosclerosis; right maxillare antrum cloudy; chronic infection in tonsils. My diagnosis was that his hearing was impaired.

After I had taken the history from Mr. Atkinson, I then examined him. My findings on the examination were as stated above. And, in addition, the tuning fork, voice, watch, and acumeter tests were done.

Otosclerosis is the disease of the internal ear, the bony structure. There is a hardening of the bone, and especially around the foot plate of the stapes, a bone in the middle ear, which fits into the oval window, which causes a fixation of this bone and prevents normal air conduction. Otosclerosis causes an impairment of the air conduction in ear. In 1926, when I examined Mr. Atkinson, he had lost all of his useful hearing. He could only hear voices in the right ear with a shout in the left ear, normal voice at six inches.

I examined Mr. Atkinson August 25, 1927. The results at that time showed no change in his ability to hear. I also examined him September 3, 1927. There was no change in above tests, except to hear voice six inches right, and can just perceive acumeter left. I also examined him on November 12, 1927, and on January 14, 1928. During all of this period of time, his ability to hear remained about the same.

123 The real cause of otosclerosis is unknown. We presume that severe infections in childhood may be a factor in causing it, and that there is frequently hereditary influences. Chronic infections may also play a part.

I removed Mr. Atkinson's tonsils on January 7, 1927.

Typhoid pneumonia, which the patient gave me a history of as having had at the age of five years, might have been the cause of his hard of hearing.

When a person has otosclerosis, and has had it over a period of twenty years, according to his history, there cannot be anything done in the way of an operation to correct that condition.

Two methods may be used on a man who has otosclerosis, as I found it in the degree that Mr. Atkinson had, with respect to making him hear. One is lip reading, in which a patient should take special training to acquire accuracy; second, there are artificial aids for hearing. There are schools where a person can go and learn to read the lips of others who are talking to him; in nearly every large city there are schools where lip reading is taught, and also in most of the state institutions it is taught where the hard of hearing are trained.

In my wide experience in dealing with hard of hearing people I have become acquainted with many people who have taken lip reading. As to my experience with reference to whether or not a person who is practically deaf can, after taking a course, read what the other man is talking to him about—I find they frequently read lips so accurately that I am deceived in taking a history before the examination.

When I said there are artificial aids of hearing I mean by that there are electrical devices on the market, which amplify sound. This amplification is accomplished through a battery device
124 regulating the intensity of the incoming sound. There are other artificial aids of hearing, such as trumpets, et cetera, which are infrequently used at this time. The method I spoke of where they use a battery, there are various sizes of batteries from approximately 4x6 inches; some of them are slightly larger. They are attached to the clothing of the patient; then there is a cord that attaches close to the ear. They are practically out of sight most of the time, except for the connection in the outer ear, and the cord extending down the neck. I advised Mr. Atkinson upon original examination to take a course in lip reading. If Mr. Atkinson should get one of the devices or artificial aids for hear, using the battery set as an example, no doubt he could hear better, but how much of an improvement it would make, I could not state. I would have to try it first.

Q. Doctor, in a case of ostosclerosis, what effect does it have upon the condition of a person as to working?

COUNSEL FOR PLAINTIFF. We object to that because he has not qualified as an expert in that line, he is an expert as a doctor, and he is undertaking to ask him here about ability in the various occupations, I understand Your Honor to exclude a similar question when we asked Dr. Vandevere.

THE COURT. Overrule the objection.

COUNSEL FOR PLAINTIFF. We except.

A. It is a marked handicap, but he should be able to take on many occupations.

Supposing that a man had otosclerosis to the degree that this man has, to work as a laborer would not make his otosclerosis any worse. Labor does not affect the condition itself. In my opinion as an expert, this man could work as a draftsman, providing, of course, he were trained along that line. Any kind of work for which he was trained, in my opinion, he could do without injury to himself.

125 COUNSEL FOR DEFENDANT. There are portions of the deposition of Edward W. Tanner I want to offer. I will just state this period of employment, if satisfactory to counsel.

COUNSEL FOR PLAINTIFF. Yes.

COUNSEL FOR DEFENDANT. This witness testifies that Mr. Atkinson worked for J. C. Nichols Investment Company, under his supervision, from about 1924 to 1928, and he gives a list of the amount of money paid in salary, beginning January 8, 1925, and continuing without interruption until July 2nd, 1928. The pay roll here, as stated by the witness, shows that from January 8th, 1925, to May 6th, 1925, he was paid a salary of $35.00 per week; that for the week ending May 14th, 1925, he was paid $51.00; for the week ending May 21st,

1925, he was paid $48.60, and there was a period of a few weeks he was paid various amounts from $35.00 to 42.00, and one week it seems he was paid $155.00; the rate of pay was changed from $35.00 to $37.50 per week on August 13th, 1925, and continued at that rate until January 14th, 1926, when he was paid $42.50; about January 21st, 1926, it was changed to $40.00 per week, and it continued at that rate until it was changed to $42.50 per week on January 6th, 1927; and continued at that rate, with the exception of three weeks, until it was changed to $45.00 per week on January 5th, 1928.

Counsel for defendant read the following portions of the deposition of said witness, Edward W. Tanner, same being, in narrative form, as follows:

Mr. Atkinson's last pay roll was on the 7th of July, 1928; I am quite sure that was the date he left the company. His employment terminated because he resigned. From my observation in being his immediate supervisor, his work with the company was satisfactory, everything considered, entirely so.

126 COUNSEL FOR DEFENDANT. I will read one or two questions from the deposition of Lee M. Fitzhugh, which is one of the depositions Mr. Morton read. This witness testified, briefly, that for a period of two or three months, Mr. Atkinson worked for Fitzhugh and Byron at Phoenix, Arizona. That was during the summer of 1929, May, June, and July, according to his testimony.

Counsel for defendant read the following portions of the deposition of said witness, Lee M. Fitzhugh, same being, in narrative form, as follows:

Mr. Atkinson suffered by reason of deafness while he was with me. He could not understand ordinary conversation, not in an ordinary tone of voice. We made him hear our conversation and instructions by raising our voices and speaking close to him.

Q. Mr. Fitzhugh, from your experience as draftsman and architect, please tell us whether or not the condition of Mr. Atkinson's hearing was such as to render it impossible, in your opinion, from pursuing his profession as a draftsman and earning a livelihood at it?

COUNSEL FOR PLAINTIFF. We object on the ground that it is calling for a conclusion.

THE COURT. The Court sustains the objection.

The Defendant rested.

THE COURT. Any further testimony?

COUNSEL FOR PLAINTIFF. No, sir; nothing further from the plaintiff.

The following stipulation was entered into by the parties hereto.

127 *Stipulation*

The parties hereto, by their attorneys of record, hereby stipulate and agree that no issue shall be submitted to the jury as to the date when due proof of total permanent disability was presented to the

defendant, as such proof was made between December 10, 1932, and February 15, 1933, but that in the event it becomes necessary in this case to determine the date of due proof, the Court may, without the aid of the jury, fix and determine said date of due proof from the evidence herein.

/s/ WALTER S. HOWE,
Assistant U. S. Attorney.
/s/ DAVID A. TURNER,
Attorney, Department of Justice.
/s/ JOHN M. WORRELL,
Attorney for Plaintiff.
/s/ R. A. D. MORTON,
Attorney for Plaintiff.

Testimony closed.

At the close of all the evidence the defendant presented the following motion for an instructed verdict in its favor:

Motion for instructed verdict

Now comes the defendant, the United States of America, and moves the Court to direct a verdict for the defendant for the following reasons, to wit:

"1. Because there is no sufficient substantial evidence to establish that plaintiff became permanently and totally disabled at any time alleged in plaintiff's petition.

128 "2. Because the plaintiff herein, having relied upon loss of hearing as the procuring cause of permanent and total disability, and it appearing from plaintiff's evidence herein that by the use of earphones of the Sonotone type he can hear an ordinary conversation conducted in a slightly raised voice at a distance of five or six feet, defendant says that there is no sufficient substantial evidence to bring plaintiff within that provision of the policy which prescribes that the loss of hearing of both ears shall be deemed to be permanent and total disability.

"3. Because it appears from the evidence herein that the plaintiff on or about June 10, 1921, at a time when he had no War Risk insurance in force, executed an application for reinstatement of his said War Risk insurance and falsely represented therein that he had not been treated or examined for any disease or defect of the ears by a physician since the lapse of his insurance, when, as a matter of fact, he had been examined and treated for his ears by two physicians since the lapse of his insurance, and as a result thereof said contract was reinstated and was subsequently merged into the converted policy which constitutes the basis of this suit, and in this connection, because of said false representations, defendant moves the Court to enter judgment for defendant.

"4. Because it appears from the evidence herein that on or about May 21, 1927, plaintiff again made a false representation of a material

fact in an application for conversion of said reinstated contract of War Risk insurance to the policy which constitutes the basis of this suit, in that plaintiff stated that he was not then disabled on account of injury or disease, when as a matter of fact he was so disabled and well knew that he was so disabled, all of which is disclosed by plaintiff's own testimony herein, and said misrepresentation, in connection with the misrepresentation made at the time of his application for reinstatement of said policy on June 10, 1921, constitutes a material misrepresentation sufficient to preclude plaintiff's recovery on the policy in issue herein, and in this connection the defendant moves the Court to enter Judgment for defendant."

129

/s/ WALTER S. HOWE.
Assistant United States Attorney,
/s/ DAVID A. TURNER,
Attorney, Department of Justice,
Attorneys for Defendant.

Counsel thereupon argued said motion before the Court, and at the conclusion of said argument the Court overruled said motion on all of the grounds urged therein, to which defendant duly excepted.

COUNSEL FOR PLAINTIFF. Subject to the right to go to the jury and reserving our rights, we make a motion for a peremptory instruction for the plaintiff.

COUNSEL FOR DEFENDANT. I think that withdraws it from the jury.

COUNSEL FOR PLAINTIFF. We will withdraw it, then, for the time being.

Whereupon the court adjourned until two o'clock P. M. on May 3rd, 1934, at which time, prior to the argument and the charge of the court, the defendant requested the following charges, which were refused by the court, and defendant's exception to such refusal allowed:

(Heading omitted.)

Defendant herein in due season requests the Court to charge the jury as follows:

Defendant's special charge no. 1

Filed May 3, 1934

The plaintiff herein, relying upon loss of hearing as the procuring cause of total permanent disability, as alleged in plaintiff's petition, and the policy involved in this suit containing a provision to the effect that the loss of hearing in both ears shall be deemed to be total permanent disability, you are instructed that it is not sufficient for the plaintiff to prove alone that he has lost all his useful hearing, unassisted by mechanical device or artificial aids to hearing, and

130 unless you find from a preponderance of the evidence that the plaintiff has lost all practical use of the sense of hearing, even

with the aid of mechanical devices, you will not be entitled to return a verdict for plaintiff herein.

(Signed) WALTER S. HOWE,
Assistant U. S. Attorney.
(Signed) DAVID A. TURNER,
Attorney, Department of Justice.

Refused.

(Signed) CHARLES A. BOYNTON,
Judge.

(File endorsement omitted.)
(Heading omitted.)

Defendant herein in due season requests the Court to charge the jury as follows:

Defendant's special charge no. 3

Filed May 3, 1934

The defendant herein having asserted as an alternative defense that the plaintiff made a false and material misrepresentation in his application for reinstatement of War Risk Insurance on June 10, 1921, in that he stated that he had not been treated by any physician for any disease or defect of the ears, and in that he stated that he had no disease or defect of the ears, and having further asserted as an alternative defense that the plaintiff likewise made a false and material misrepresentation in that he stated on May 21, 1927, in his application for conversion of the said War Risk Insurance into a Government Life Insurance contract that he was not then disabled on account of injury or disease, you are instructed that if you find from the evidence herein that the plaintiff had been in fact treated by physicians contrary to his representation; that he was in fact suffering from a disease or defect of the ears at the time he applied for reinstatement; and that he was in fact disabled from injury or
131 disease at the time he applied for conversion of such War Risk Insurance to said Government Life Insurance, and that the plaintiff made such representations; that they were false and that they were material to the reinstatement of such insurance and the subsequent conversion thereof, and that the defendant was thus misled and thereby induced to reinstate said War Risk Insurance and subsequently convert the same to Government Life Insurance, you will then return a verdict for the defendant in this case, and in this connection you are further charged that the defendant cannot be charged with the neglect, failure, or refusal of any of its officers or agents to examine the records of the Government for the purpose of determining the truth or falsity of such misrepresentations, and the fact that any officers or agents of the defendant had knowledge of the plain-

tiff's condition at the time of said misrepresentation is not binding upon the defendant and does not charge the defendant with such knowledge.

(Signed) WALTER S. HOWE,
Assistant U. S. Attorney.
(Signed) DAVID A. TURNER,
Attorney, Department of Justice.

Refused.

(Signed) CHARLES A. BOYNTON,
Judge.

(File endorsement omitted.)

Whereupon the arguments were made, and the Court charged the jury as follows:

Charge to jury

Gentlemen of the jury:

The Court will now give you in charge, orally, as is the practice in the United States Court, the law as applicable to the issues of fact submitted to you for determination in this case.

132 The plaintiff, Ray Keith Atkinson, brings suit herein, in its nature a civil action based upon a contract, seeking recovery of a money judgment against the defendant, the United States of America; plaintiff alleging as cause of action herein that on or about September 30, 1918, plaintiff enlisted in the military service of the United States, and served therein until on or about the 26th day of December 1919. That while he was enlisted and serving as a soldier in the army of the United States he made application for what is termed War Risk Insurance, and was issued a certificate in the sum of $10,000.00, in accordance with the statute and laws of the United States applicable thereto. That later on, in accordance with law, he made application to convert said War Risk Insurance, as evidenced by certificate of War Risk Insurance previously issued to him, into what is termed a Five Year Term Convertible policy issued by the Government of the United States of America. That on or about June 1, 1932, there was issued to him by the defendant, the United States of America, government life insurance policy No. K–634242, Five Year Term Convertible insurance. That such insurance was renewed and extended into what is known as Five Year Level Premium Term Insurance issued by the defendant, the United States. That said policy No. K–634242 was in the sum of $10,000.00; that such insurance in the sum of $10,000.00 was continued by virtue of the Five Year Level Premium Insurance; that all premiums have been paid on such insurance up to and including the month of May 1934, and on July 1, 1927, such insurance was in full force and effect, and has been kept in full force and effect at all times since said date. It is alleged by plaintiff that by the provisions and terms of said policy of insurance that the same is now incontestible.

It is further alleged in plaintiff's first amended original petition, upon which the plaintiff went to trial in this case, that said

133 Five Year Term Convertible policy No. K-634242 provided that in the event of the plaintiff becoming totally and permanently disabled while the same was in full force and effect, said insurance would become due and payable by the defendant to the plaintiff at the rate of $57.50 per month from and after the date of such total and permanent disability; and plaintiff says that said Five Year Level Premium Insurance policy is conditioned in like manner.

Further, that said policy specially provides in Paragraph 11, Sec. (a), as follows: "Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total and permanent disability shall be refunded without interest."

Plaintiff alleges further that on January 1, 1928, he was suffering from the condition or disease or diseases of his ears set forth in his petition, among the causes therein enumerated, which occasioned the loss of hearing in both of his ears, and as a result of such disease or diseases and said condition of his ears, he was on January 1, 1928, totally and permanently disabled within the purview of said Paragraph 11, Sec. (a) of said policy; and in any event plaintiff alleges that he was at said time, by reason of the condition of his ears, and the loss of hearing therein, totally and permanently disabled within the purview of said policy of insurance, and of the laws and statutes of the United States of America, in this, that at said time he was suffering from an impairment of body which rendered him unable to follow continuously a substantially gain-

134 ful occupation, and at said time it was reasonably certain that said total disability would continue throughout the remainder of his life, and in any event plaintiff says that he became so totally and permanently disabled at some time prior to the filing of his claim for benefits under said insurance on or about December 10, 1932, and that he became so permanently and totally disabled while his said insurance was in full force and effect, and that upon the happening of said contingency of total and permanent disability, said insurance became due and payable, and plaintiff alleges that the defendant became indebted to the plaintiff on said insurance at the rate of $57.50 per month for each and every month from and after the date of such total and permanent disability.

Wherefore plaintiff brings his suit and action herein, seeking recovery of a money judgment against the defendant, United States of America, for the recovery of $57.50 per month from and after the date of his total and permanent disability, and for attorney's fees as therein provided.

By way of answer to plaintiff's cause of action, as set up and alleged in plaintiff's said First Amended Original Petition filed herein, the defendant files as its First Amended Original Answer what in law is termed and designated as a general denial, which, in its legal effect, means that the defendant denies each and all of the allegations alleged in plaintiff's petition and cause of action asserted by the plaintiff herein, and places the burden of making such proof upon the plaintiff.

Referring to the evidence in this case, the Court will instruct you that it is shown by the uncontroverted evidence in the case that the defendant, the United States of America, did, on June 13, 1927, issue an insurance policy, Government Life Insurance policy bearing number K–634242 to the plaintiff, Ray Keith Atkinson, in the amount of $10,000.00, which policy of insurance provides that the same was to take effect as of the 1st day of June, 1927; and in said
135 policy of insurance it is provided, in Paragraph 11 thereof, as follows: "Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person." And in Clause (a) of said Paragraph 11 of the policy, as relating to total and permanent disability, it is provided as follows: "Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest."

Therefore, gentlemen of the jury, you are instructed by the Court as a matter of law that, by the terms and provisions of said life insurance policy issued by the defendant, United States of America, to the plaintiff, Ray Keith Atkinson, it is provided that in the event that the insured, the plaintiff herein, sustained loss of the hearing of both ears, the same constitutes total and permanent disability under the terms and provisions of said War Risk Insurance policy.

Further, that under the terms and provisions of said policy, the defendant is obligated to pay the amount therein provided in the event that the plaintiff is shown to be totally and permanently disabled, which is defined to be any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded
136 upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person.

The plaintiff, as ground and right of recovery, as alleged by him herein, alleges that between the periods of time as specified in his pleadings, to which your attention will be further directed in the Court's charge herein, that he sustained the loss of hearing of both ears; and he further alleges that, in any event, by the impairment of his hearing that he has been totally and permanently disabled within the terms and meaning of said policy of insurance.

You are instructed by the Court that the burden rests upon plaintiff to prove by a preponderance of the evidence each of the grounds for which he seeks recovery in this suit, and all of the elements necessary to his recovery herein.

You are instructed by the Court that as to the meaning of the term "preponderance of the evidence" given you in the charge herein, that the same means that evidence which, after consideration of all of the evidence, is in your judgment entitled to the greatest weight. A fair preponderance of evidence means such evidence as when weighed with that opposed to it has the most convincing power in the minds of the jury. It is not necessarily a technical term, but means simply that evidence which outweighs that which is offered to oppose it. It does not mean that a greater number of witnesses shall be produced on one side than on the other, but that on the whole evidence the jury believes the greater probability of the truth to be on the side of the party having the affirmative of the case, the plaintiff in this suit.

Therefore, gentlemen of the jury, if you believe and find it is shown by a preponderance of the evidence that on January 1, 1928, or between January 1, 1928, and December 10, 1932, plaintiff lost the hearing of both ears, and that such loss of hearing is likely
137 to continue throughout the remainder of his life; or that the plaintiff on January 1, 1928, or between said date and December 10, 1932, is shown by preponderance of the evidence, by reason of the condition of his ears and loss of hearing and impairment of his hearing, became totally and permanently disabled within the purview of his policy, and previous instructions as to the law given you in charge by the Court heretofore in the Court's charge herein, that he was suffering by reason thereof from impairment of body which render him unable to follow continuously a substantially gainful occupation, and at said time it was reasonably certain that such total disability would continue throughout the remainder of his life, you will in either of said events return a verdict in this case in favor of the plaintiff.

The Court will further charge you in this connection with reference to the meaning of the terms of the policy of insurance relating to the loss of hearing, that the same means the permanent loss of the sense of hearing of both ears to the extent that the same is of no practical use or benefit, and without reasonable hope or expectation of regaining the sense of hearing. That is, it means that so much of the sense of hearing must be lost as will render the remaining part, if any, of no material, practical use or benefit. In other

words, it means whether the sense of hearing is so impaired there is no reasonable probability that plaintiff's sense of hearing will ever be of any practical use. If it is so impaired, then there is loss of hearing within the meaning of the policy which would entitle plaintiff to recover herein. But if you find and believe from the evidence that such loss of hearing is not shown to be so impaired, then he would not be entitled to recover herein for loss of hearing of his ears. But you will bear in mind the previous charge of the Court as to his right to recover, if it is shown by a preponderance of the evidence that he suffered an impairment of body by reason of his loss or impairment of hearing that would render it impossible
138 for him to continuously follow a substantially gainful occupation, and that the same would likely continue throughout the remainder of his life.

On the other hand, gentlemen of the jury, if you should believe it is not shown by a preponderance of the evidence that plaintiff has suffered loss of hearing of both of his ears, or from impairment of hearing, during such period of time from January 1, 1928, or prior to December, between said date and December 10, 1932, he sustained such loss of hearing; or it is not shown by a preponderance of the evidence that his hearing has been impaired to the extent that he has been rendered totally and permanently disabled within the meaning of such insurance policy, and previous instructions and definitions given by the Court herein, you would then in such event return a verdict in favor of the defendant herein.

In connection with your consideration of the question at issue, as to whether the plaintiff is shown by reason of impairment or loss of hearing, impairment of his hearing, on January 1, 1928, and between said date and December 10, 1932, as to render him totally and permanently disabled, that is unable to follow any substantially gainful occupation, you will take into consideration the question as to the use of any artificial device to augment or aid any sense of hearing that the plaintiff may be shown to have, in your determination of the question of whether or not, together with the use of such device, he may be able to secure a substantially gainful occupation and continuously follow the same.

In considering the question of the man's securing and continuously following a gainful occupation, the jurors will take into consideration in connection therewith the education the man has, the fitness that he has to follow certain occupations, certain character of work, and they are not to be confined to a consideration of his fol-
139 lowing the character of work he may have to followed in the past. Though that will be taken into consideration, it will be governed by what the jurors believe from the testimony to be the character of occupation it is shown he is capable of following.

You, gentlemen of the jury, are the exclusive judges of the credibility of the witnesses, the weight to be given their testimony, and the facts proven in the case, and in your consideration of the issues

of facts submitted you for determination in this case, you will be controlled solely by the testimony as given from the witness stand and heard on the trial of the case, and the deductions which you may make therefrom, and not be influenced by any outside matters or matters of sympathy. You will determine the issues of fact in accordance with the testimony given from the witness stand on trial of the case, and be controlled by the law as given you in charge by the Court herein.

After the Court's main charge was delivered, the following proceedings were had out of the hearing of the jury:

COUNSEL FOR DEFENDANT. We will except to the Court's failure to include a charge relative to the use of a mechanical device, as to that provision of the policy defining loss of hearing, and stating that it shall be total and permanent disability, and we request now that the Court instruct the jury in conformity with our special charge No. 1 in that respect, which states in effect that the jury will not be entitled to return a verdict for the plaintiff unless they find from a preponderance of the evidence that he has lost all practical use of his sense of hearing even with a mechanical device.

THE COURT. The Court will say every requested charge that has been asked by either side is refused by the Court, and it is considered that counsel on each side excepted to the refusal to give them.

140 COUNSEL FOR DEFENDANT. We also want to except to the Court's charge because it fails to mention the trial amendment filed by the defendant herein, which was read before the jury, and because the Court fails to submit to the jury the issues of fact presented by the trial amendment, which we requested again at this time.

Whereupon, the Court further instructed the jury as follows:

THE COURT: The Court will say to the jury right now, gentlemen of the jury, with reference to the trial amendment filed on behalf of the defendant, United States of America, and the reply thereto filed by plaintiff, the Court deems the evidence offered on the trial of the case insufficient to support the issues sought to be raised in said pleadings, and because of the immateriality of the grounds alleged in such amended trial amendment and insufficiency of the evidence, the Court does not submit to the jury any of the issues raised by the trial amendment.

COUNSEL FOR DEFENDANT. To which action of the Court we except, and request that the special charge be given as requested, being Defendant's Special Charge No. 3.

THE COURT. You may now retire to the jury room, select your own foreman, and as soon as you have arrived at a verdict, return the same into court. The Court will charge you as to the form of your verdict. As to the form of your verdict in this case, in the event your findings be in favor of the plaintiff, you will say: "We, the Jury, find in favor of the plaintiff, that he was totally and permanently disabled," on a date which you will designate, if you find

that he was. If your verdict be in favor of the plaintiff, specify some date between January 1, 1928, and December 10, 1932. In the event your findings be in favor of the defendant, you will
141 merely say: "We, the Jury, find in favor of the defendant." Gentlemen, you may retire to the jury room.

(Reporter's certificate to foregoing transcript omitted in printing.)

Agreement of counsel

It is agreed by and between counsel for the respective parties hereto that the above and foregoing 126 pages (numbered 1 to 111, both inclusive, and including also additional pages numbered 54–A, 54–B, 54–C, 54–D, 54–E, 54–F, 56–A, 56–B, 56–C, 56–D, 56–E, 99–A, 99–B, 100–A, and 100–B) constitute a full and complete, true and correct , statement in narrative form, except where the parties could not agree upon a narrative statement, and the same is, accordingly, transcribed in question and answer form, of all the evidence adduced and proceedings had upon the trial of the above entitled and numbered cause, and that the same shall constitute the bill of exceptions on this appeal and may be settled and filed as such.
142 Witness our hands this the 6th day of August, A. D. 1934.

(Signed) R. A. D. MORTON,
(Signed) JOHN M. WORRELL,
Attorneys for Plaintiff, Ray Keith Atkinson.
(Signed) WALTER S. HOWE,
(Signed) DAVID A. TURNER,
Attorneys for Defendant, United States of America.

In United States District Court

Order settling bill of exceptions

The defendant, the United States of America, having tendered the foregoing as defendant's bill of exceptions to the rulings of the court upon the trial of this cause, and it appearing to the court that the parties hereto, by their attorneys, have stipulated and agreed that the same contains a full and complete, true and correct, statement in narrative form of all the evidence adduced and proceedings had in said cause, except where certain portions of the evidence are set out in question and answer form, which portions have been ordered to be so set out because counsel had been unable to agree upon a narrative statement of such portions, and that the same may be settled and filed as the bill of exceptions on this appeal;

And it further appearing to the Court that the same contains a full and complete, true and correct, statement of all the evidence adduced and proceedings had in said cause;

It is, therefore, certified that the foregoing is a full and complete, true and correct, statement of all the evidence adduced and pro-

ceedings had in said cause, and it is, accordingly, ordered that the same be, and it is hereby approved and ordered filed as the bill of exceptions on this appeal.

Entered at El Paso, Texas, on this 7th day of August, A. D. 1934.

CHARLES A. BOYNTON,
United States District Judge.

Filed the ——— day of ———, A. D. 1934.

143 In United States District Court

Petition for appeal

Filed August 2, 1934

Now comes the defendant, the United States of America, by its attorneys of record, and feeling aggrieved by the judgment of the court entered herein on the 7th day of May 1934, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit for the reasons set out in the assignments of error accompanying this petition and prays that its appeal be allowed and citation issue, as provided by law, and that a transcript of the record and proceedings upon which said judgment was based be duly authenticated and sent to the United States Circuit Court of Appeals for the Fifth Circuit.

Your petitioner further prays that the proper order relating to the security for this appeal be entered.

WALTER S. HOWE,
Asst. United States Attorney.
DAVID A. TURNER,
David A. Turner, Attorney, Department of Justice,
Attorneys for Defendant.

In United States District Court

Assignment of errors

Filed August 2, 1934

Now comes the defendant, the United States of America, in the above-styled and numbered cause in connection with and as a part of its petition for appeal herein and assigns the following errors which it avers were committed by the District Court in its rulings, orders, and instructions and refusal to instruct in said cause and upon which defendant relies to reverse the judgment entered herein as appears by the record:

144 I. The court erred in overruling the defendant's motion for an instructed verdict in its favor because the evidence was not sufficient to sustain a finding that the plaintiff became totally and permanently disabled at any time between June 1, 1927, the initial

effective date of the policy sued upon, and December 10, 1932, the date of claim thereon, in that:

(a) The evidence, considered in the light most favorable to the plaintiff, fails to establish that during said time the insured suffered an impairment of mind or body which continuously rendered it impossible for him to follow any substantially gainful occupation and which was founded upon conditions which rendered it reasonably certain to continue throughout his life;

(b) Since the plaintiff relies upon a disease of the ears, allegedly resulting in loss of hearing, the evidence, considered in the light most favorable to the plaintiff, is insufficient to bring the plaintiff within that provision of the policy sued upon, Paragraph 11 (a) thereof, which prescribes, in effect, that the permanent loss of hearing of both ears shall be deemed to be total permanent disability;

(c) Since the evidence goes no further than to establish that the plaintiff has at some time suffered a considerable loss of hearing, it could have no substantial bearing on the plaintiff's right to recover herein except by virtue of the provisions of Paragraph 11 (a) of the policy sued upon, prescribing, in effect, that the permanent loss of hearing of both ears shall be deemed to be total permanent
145 disability, and said Paragraph 11 (a) of the policy, having been written therein without authority of law and constituting an unwarranted and unauthorized attempt to enlarge the coverage prescribed by law, can have no force or effect in this suit.

II. The court erred in overruling the defendants's motion for an instructed verdict in its favor because the uncontroverted evidence shows that the plaintiff did, on June 10, 1921, at a time when he had no War Risk Insurance in force, execute an application for reinstatement of his said War Risk Insurance and falsely represented therein that he had never been treated for any disease of the ear and had not consulted a physician or anyone in regard to his health since the lapse of his insurance, when, as a matter of fact, the uncontroverted evidence shows that the plaintiff had been examined and treated for his ears by two physicians, and such misrepresentation was not only false but was material because it related to the same condition relied upon by plaintiff for recovery herein, and was made to procure for plaintiff the reinstatement of insurance subsequently merged into the contract upon which this suit is founded.

III. The court erred in overruling defendant's motion for an instructed verdict in its favor because the uncontroverted evidence showed that the plaintiff did, on or about May 21, 1927, prior to the issuance of the converted policy sued upon, make a false representation in his application for conversion of plaintiff's contract of War Risk Insurance to the policy which constitutes the basis of this suit in that plaintiff stated and so represented to the defendant that he was not then disabled on account of injury or disease, when, as a matter of fact, the evidence shows that plaintiff was so disabled and well knew that he was so disabled, and said misrepre-

146 sentation constituted a material misrepresentation sufficient to preclude plaintiff's recovery on the policy in issue.

IV. The court erred in denying defendant's motion to enter judgment for defendant herein because the uncontroverted evidence showed that the plaintiff did, on June 10, 1921, at a time when he had no War Risk Insurance in force, execute an application for reinstatement of his said War Risk Insurance and falsely represented therein that he had not been treated or examined for any disease or defect of the ears, when, as a matter of fact, the evidence shows indisputably that he had been examined and treated for his ears by two physicians since the lapse of his insurance, and as a result of said application containing false representations, plaintiff procured the reinstatement of his said contract of War Risk Insurance which was subsequently merged into the converted policy which constitutes the basis of this suit, and because of said misrepresentation, plaintiff should not have been allowed to recover in this action.

V. The court erred in instructing the jury as follows: "In connection with your consideration of the question at issue, as to whether the plaintiff is shown by reason of impairment or loss of hearing, impairment of his hearing, on January 1, 1928, and between said date and December 10, 1932, as to render him totally and permanently disabled, that is unable to follow any substantially gainful occupation, you will take into consideration the question as to the use of any artificial device to augment or aid any sense of hearing that the plaintiff may be shown to have, in your determination of the question of whether or not, together with the use of such device, he may be able to secure a substantially gainful occupation and continuously follow the same . . ." and in not charging the jury to take into consideration the use of an artificial device to augment or

147 aid any sense of the hearing that the plaintiff may have been shown to have in a determination of the question as to whether or not the plaintiff had suffered, during the stated period, such loss of hearing as would bring him under the provisions of the policy, Paragraph 11 (a), prescribing that the permanent loss of hearing of both ears shall be deemed to be permanent total disability. A charge on this point was requested in due season by the presentation of Defendant's Special Charge No. 1, which was refused by the court, and a failure to include such a charge was again called to the attention of the court after the main charge was delivered when counsel for defendant renewed the request that the jury be instructed as to the use of a mechanical device in their consideration of the provision of the policy defining loss of hearing. Such failure so to charge the jury was error and virtually amounted to an instruction to return a verdict for the plaintiff because there was little dispute that the plaintiff had lost all his practical hearing unless his ears were aided by artificial means.

VI. The court erred in not submitting to the jury the issue as to the false and material misrepresentation of the plaintiff in his appli-

cation for reinstatement of his War Risk Insurance on June 10, 1921, wherein plaintiff stated that he had not been treated by any physician for any disease or defect of the ears, because such issue was raised by defendant's trial amendment, there was proof to support said trial amendment in this respect and a jury finding favorable to the defendant on the issue thus raised would have precluded plaintiff's recovery in this case and defendant would have been entitled to judgment. The court not only failed to submit such issue in his main charge, but when the defect was called to the court's attention by counsel for defendant, the court thereupon instructed the jury that the issue would not be submitted because the court considered the evidence offered in the trial of the case insufficient to support the issue sought to be raised in the trial
148 amendment and because of the immateriality of the grounds alleged in such trial amendment.

VII. The court erred in not submitting to the jury the issue as to the false and material misrepresentation of the plaintiff in his application for conversion of his War Risk Insurance to Government Life Insurance executed on May 21, 1927, wherein plaintiff stated that he was not then disabled on account of injury or disease, because such issue was raised by defendant's trial amendment, there was proof to support said trial amendment in this respect, and a jury finding favorable to the defendant on the issue thus raised would have precluded plaintiff's recovery in this action and defendant would have been entitled to judgment. The court not only failed to submit such issue in his main charge, but when the defect was called to the court's attention by counsel for defendant, the court thereupon instructed the jury that the issue would not be submitted because the court considered the evidence offered on the trial of the case insufficient to support the issue sought to be raised in the trial amendment and because of the immateriality of the grounds alleged in such trial amendment.

VIII. The court erred in instructing the jury as follows:

"And in Clause (a) of said Paragraph 11 of the policy, as relating to total and permanent disability, it is provided as follows: 'Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.'"

149 "Therefore, gentlemen of the jury, you are instructed by the Court as a matter of law that, by the terms and provisions of said life insurance policy issued by the defendant, United States of

America, to the plaintiff, Ray Keith Atkinson, it is provided that in the event the insured, the plaintiff herein, sustained loss of the hearing of both ears, the same constitutes total and permanent disability under the terms and provisions of said War Risk Insurance Policy."

Because clause 11 (a) of the policy, quoted in the court's charge, providing, among other things, that the loss of the hearing of both ears shall be deemed to be total permanent disability, was placed in said contract without authority of law, the Statutes delegating no authority to any Government official to put into a contract of Government life insurance such a provision, and this provision went far beyond the power delegated which prescribed that Government insurance would provide protection against death and total permanent disability and, in some cases, against total disability; moreover, this provision of the policy is in conflict with and goes far beyond the usual and customarily accepted definition of permanent total disability and constitutes an unauthorized and unwarranted attempt to enlarge the coverage prescribed by law. This error was not called to the attention of the trial court, but it is fundamental and, being such, can be considered on this appeal.

IX. The court erred in refusing to charge the jury as requested in Defendant's Special Charge No. 1, as follows:

"The plaintiff herein, relying upon loss of hearing as the procuring cause of total permanent disability, as alleged in plaintiff's petition, and the policy involved in this suit containing a provision to the effect that the loss of hearing in both ears shall be deemed to be total permanent disability, you are instructed that it is not sufficient for the plaintiff to prove alone that he has lost all his
150 useful hearing, unassisted by mechanical device or artificial aids to the hearing, and unless you find from a preponderance of the evidence that the plaintiff has lost all practical use of the sense of hearing, even with the aid of mechanical devices, you will not be entitled to return a verdict for plaintiff herein."

This was error because plaintiff did not come within the provisions of the policy, Paragraph 11 (a), prescribing that the loss of hearing of both ears shall be deemed to be permanent total disability, unless he had lost so much of his hearing that that which was left, even by the use of an artificial device to aid or augment his ears, was of no practical use or benefit.

X. The court erred in refusing to charge the jury as requested in Defendant's Special Charge No. 3, as follows:

"The defendant herein having asserted as an alternative defense that the plaintiff made a false and material misrepresentation in his application for reinstatement of War Risk Insurance on June 10, 1921, in that he stated that he had not been treated by any physician for any disease or defect of the ears and in that he stated he had no disease or defect of the ears, and having further asserted

as an alternative defense that the plaintiff likewise made a false and material misrepresentation in that he stated on May 21, 1927, in his application for conversion of the said War Risk Insurance into a Government Life Insurance contract that he was not then disabled on account of injury or disease, you are instructed that if you find from the evidence herein that the plaintiff had been in fact treated by physicians contrary to his representation; that he was in fact suffering from a disease or defect of the ears at the time he applied for reinstatement, and that he was in fact disabled from injury or disease at the time he applied for conversion of such War Risk Insurance to said Government Life insurance; and that the plaintiff made such representations, that they were false and that they were material to the reinstatement of such insurance and the subsequent conversion thereof, and that the defendant was thus misled
151 and thereby induced to reinstate said War Risk Insurance and subsequently convert the same to Government Life Insurance you will then return a verdict for the defendant in this case, and in this connection you are further charged that the defendant cannot be charged with the neglect, failure, or refusal of any of its officers or agents to examine the records of the Government for the purpose of determining the truth or falsity of such misrepresentations, and the fact that any officers or agents of the defendant had knowledge of the plaintiff's condition at the time of said misrepresentation is not binding upon the defendant and does not charge the defendant with such knowledge."

The refusal so to charge was error because the pleadings and the proof raised the issues of fact presented in this charge and the court not only refused to submit to the jury any issue of fraud or misrepresentation based upon defendant's trial amendment, but also instructed the jury that the evidence offered on the trial of the case was insufficient to support the issue sought to be raised in defendant's trial amendment and that because of the immateriality of the grounds alleged therein and of the insufficiency of the evidence the court would not submit any of the issues raised thereby.

XI. The court erred in admitting over defendant's objection and proper exception thereto the testimony of the plaintiff that he had never succeeded in getting a job when he went up to apply for it wearing his earphone. The testimony, objections and ruling of the court thereon relating to this evidence is as follows:

"Q. Mr. Atkinson, I will ask you whether or not you have found that the wearing of this ear phone is an impediment or hindrance in obtaining employment?

"COUNSEL FOR DEFENDANT. I think that calls for a conclusion of the witness.

"THE COURT. The Court sustains the objection, it would be a conclusion upon his part.

152 "Q. I will ask you this question, have you ever succeeded in obtaining employment when you went up to obtain it with this ear phone?

"A. I am sorry, I didn't get all of that.

"Q. I say, have you ever succeeded in getting a job when you went up to apply for it wearing your ear phone?

"A. No; I never have.

"COUNSEL FOR DEFENDANT. I think that is likewise immaterial and argumentative, and is getting the same thing in a different way. I am certain the question is argumentative, to say the least.

"THE COURT. Overrule the objection.

"COUNSEL FOR DEFENDANT. Note our exception."

This was error because the evidence adduced thereby was argumentative, prejudicial, and would tend to play upon the sympathy of the jury.

XII. The court erred in admitting on behalf of the plaintiff over defendant's objection and proper exception thereto the medical examiner's report and particularly questions No. 19 and 22 and the answers thereof signed by Dr. A. W. Hyde, a private physician of Brookings, South Dakota, dated June 10, 1921. The testimony admitted, the objections, rulings of the court, and exceptions taken thereto are as follows:

"COUNSEL FOR PLAINTIFF. Now, Your Honor, we want to offer from the reverse side of that instrument, what is styled "Medical Examiner's Report", Question No. 19, reading: 'After an examination do you find'——

"COUNSEL FOR DEFENDANT. Wait a minute, what question?

"COUNSEL FOR PLAINTIFF. No. 19.

"COUNSEL FOR DEFENDANT. If the Court please, we object to reading before the jury what is on that paper before it is admitted in evidence, the Court hasn't ruled on that.

153 "COUNSEL FOR PLAINTIFF. We want Questions 19 and 22.

"COUNSEL FOR DEFENDANT. Now, if the Court please, those questions are a part of the medical examiner's report and we object to their admission in evidence, or to any part of the medical examiner's report, because it has not been identified in the maner required by law, there is no showing that the examiner himself is not available and it has not been certified to as an official record, and is hearsay and immaterial under the pleadings.

"THE COURT. The document comes from the possession of the government, the defendant has referred to sections of it and sections have been offered in evidence by counsel for defendant, and the Court will overrule objection.

"COUNSEL FOR DEFENDANT. Note our exception for the reasons stated.

"COUNSEL FOR PLAINTIFF. Question 19 reads: 'After an examination do you find any abnormality of the lungs, no; heart, no; nervous system, no; skin, no; ear, yes; eye, no; abdomen, no; or digestive system ------?' Question 22 reads: 'Any defect in the sight or hearing? Right ear 20/40.' We offer also the date of that, June 10th, 1921, and the signature of A. W. Hyde, and the stamp reading: 'Approved,

Date 6-17-21, Insurance Medical Section. By (signed) H. L. Mann.'"

This was error because the report of examination was an uncertified report of a private physician submitted as a part of the plaintiff's application for reinstatement of his insurance; it was not identified in any manner required by law; there was no showing that the examiner himself was not available as a witness; the report was not certified as an official record; it was hearsay and immaterial under the pleadings. The record shows (Bill of Exceptions, pages 31, 32, 43, 55, 56, 57) that the document to which the court referred had not been offered in evidence by the defendant; it was the plaintiff's application for reinstatement that was offered by defendant
154 and only those portions of it that contained plaintiff's signature and had been identified by him. The "Medical Examiner's Report" was not offered in evidence on behalf of the defendant and had not been referred to, it was a separate instrument, and it did not matter that the form to be filled out by the doctor was printed on the last sheet of the application for reinstatement. Its offer and admission in evidence was prejudicial because made for the purpose of proving that the Government was not deceived by Plaintiff's misrepresentation that he had not been treated for any disease or defect of his ears and for the additional purpose of proving that the Government had knowledge of the defect.

XIII. The court erred in permitting Dr. W. E. Vandevere, a medical expert witness for plaintiff, to answer a question embodying a portion of the facts in the case and seeking his opinion as to whether or not plaintiff was permanently and totally disabled because such question called for a conclusion upon the ultimate issue to be determined by the jury, it invaded the province of the court and jury, contained a mixed question of fact and law, and, being hypothetically put, did not contain all the evidence that had been adduced up to that point in that it did not contain a statement to the effect that the plaintiff could, by the use of a mechanical device, hear practically an ordinary conversation. Objection on these grounds was made to all the testimony sought to be introduced through this witness relating to permanent total disability of the plaintiff and exception to the court's ruling was reserved. The testimony, objections, rulings of the court, and exceptions were as follows:

"Q. Now, Dr. Vandevere, suppose that this plaintiff for several years, well, from and after the date of his discharge back in about 1918, was carrying on, working part of the time as a school teacher, up to about 1923, and then after that as an employee in the
155 architectural business, as a draftsman and tracer; that during that period of time, up until the fall or winter of 1927 and '28, fall of '28, he was able to carry on and did carry on, earning during the latter years, say the last three years, up to 1928, approximately $200.00 a month as an architectural employee in the drafting or tracing department; that during the winter and spring of 1927 and '28 he had a series of bad colds, that about July, 1928, he came

West, went out to the West Coast and stayed for some six or eight months, then came to Phoenix, Arizona, and stayed there for a limited time, some two or three months; that at Phoenix, Arizona, he worked for an architectural concern and earned about $500.00 or $600.00 over a period of a few months, then he came to El Paso, and in 1929 he was employed for about two months with Mr. O. H. Thorman, an architect here in El Paso; that after about a month with Mr. Thorman, he was discharged because of his inability to hear and carry on conversations requisite in that business, that shortly after that he was given employment again by Mr. Thorman, with the same results, that he was discharged because of his hearing. Now, taking into consideration those facts and taking into consideration what you know of your own personal knowledge of this case from examinations made by you, excluding any history that Mr. Atkinson might have given you at the time of those examinations, and further bearing in mind that the definition of total and permanent disability is as follows: 'Any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions, which render it reasonably certain that the total disability will continue throughout the life of the disabled person', now, Doctor, from the facts stated in that definition of total and permanent disability, and from our own personal knowledge of this case, are you able to form an opinion as to whether or not the plaintiff is totally and permanently disabled?

"A. I feel sure that he is.

156 "COUNSEL FOR DEFENDANT. We object, that isn't responsive, answer yes or no, anything else we object to at this time.

"Q. Can you answer that yes or no?

"A. Yes.

"Q. Now Doctor, in your opinion, is the plaintiff at this time totally and permanently disabled?

"COUNSEL FOR DEFENDANT. If the Court please, we object to that question for the reason that it calls for a conclusion upon the ultimate issue to be determined by the jury in this case, therefore, it invades the province of the Court and jury, and contains a mixed question of fact and law; and we further object to it for the reason that, it being hypothetically put, it doesn't contain all of the evidence that has been adduced here and we point out particularly that it does not contain a statement to the effect that this plaintiff can, by the use of a mechanical device, hear, hear practically an ordinary conversation; and we object further for the reason that under the pleadings in this case, it is immaterial whether or not the plaintiff is permanently and totally disabled at this time.

"THE COURT. What do you mean?

"COUNSEL FOR DEFENDANT. I mean by that, Your Honor, that the pleadings are limited to the time of the filing of the claim, the claim of his total and permanent disability.

"THE COURT. The Court will hear from counsel on the last objection urged.

"COUNSEL FOR PLAINTIFF. I think I can change the form of the question so that it will eliminate the objection. I will withdraw the last question and ask it another way.

"Q. Now, Doctor, bearing in mind the facts that I have stated, bearing in mind the facts that you have gained from your personal observation and examination of this plaintiff, bearing in mind the definition of total and permanent disability given you, are
157 you able to form an opinion as to whether or not the plaintiff was totally and permanently disabled at any time between January 1st, 1928, and December 10, 1932?

"A. I am.

"Q. Will you give that opinion, Doctor?

"COUNSEL FOR DEFENDANT. That is the same one objected to and the Court has overruled the objection and exception is taken.

"A. I think it must have been several years, this condition that he is in now, he has been practically in this condition, practically this deaf, I am sure, for at least four or five years before my examination a year ago, as shown by this examination recently, a year's duration there has been very slight decrease. This type of hearing defect is a slowly progressive type, and I think that it must have been of several years' duration.

"COUNSEL FOR DEFENDANT. I think the comment of the Doctor is not responsive to the question; the question was, was he or not totally and permanently disabled, as I understand, and his reasons would be a different question.

"THE COURT. Overrule the objection.

"COUNSEL FOR DEFENDANT. Note our exception.

"Q. Then, Doctor, are you able to form an opinion as to the probable date of total and permanent disability?

"COUNSEL FOR DEFENDANT. We want to say that our objection goes to all of this line of testimony on the ultimate issue in the case and involving any hypothetical set of facts. I will not jump up every time, if the Court will allow it.

"THE COURT. The Court will overrule the objection to the last question.

"A. I think this man has been in practically the same condition for several years, at least four or five years.

"Q. Doctor, I will ask you this question, bearing in mind these things that I have stated to you, are you able to form an
158 opinion as to whether this plaintiff was totally and permanently disabled on December 10th, 1932?

"A. Yes.

"Q. Will you state whether or not, Doctor, in your opinion, he was totally and permanently disabled on December 10th, 1932?

"COUNSEL FOR DEFENDANT. We object to that question, first, because it is leading and, second, for the same reasons we objected to the former.

"THE COURT. Sustain the objection on the first ground, that it is leading and suggestive. Bearing in mind these facts that you have to me, I am able to form an opinion as to whether or not this plaintiff had lost all practical use of his hearing on December 10th, 1932. I think that he had lost all useful hearing at that date.

"Q. Now, Doctor, bearing in mind these facts that I have detailed to you and your personal knowledge of this case, are you able to form an opinion as to how long before December 10th, 1932, he had become so totally and permanent disabled?

"COUNSEL FOR DEFENDANT. He has not answered the question as to total and permanent disability yet. As I understand, his answer to that question as worded is based on the assumption that he has answered that question one way or the other we renew the objection anyhow for the same reasons stated before.

"COUNSEL FOR PLAINTIFF. To save any controversy over it, I will withdraw the question and put it in a different manner."

Wherefore, the defendant prays that the judgment entered herein be reversed and rendered in favor of defendant and, if the cause be not reversed and rendered, that it be reversed and remanded for a new trial.

WALTER S. HOWE,
Asst. United States Attorney,
DAVID A. TURNER,
David A. Turner, Attorney, Department of Justice,
Attorneys for Defendant.

159 In United States District Court

Order allowing appeal

Filed August 2, 1934

On the 2nd day of August, A. D. 1934, came on to be heard the petition of the defendant for an appeal herein, and it appearing to the court that said petition has been presented in due season, it is hereby ordered that an appeal from the judgment entered in this cause to the United States Circuit Court of Appeals for the Fifth Circuit be, and the same is hereby, allowed, and that a certified transcript of the pleadings, stipulations, and proceedings herein be transmitted to the United States Court of Appeals for the Fifth Circuit.

The appeal being by the United States of America, no bond on appeal shall be required.

CHARLES A. BOYNTON, *Judge.*

In United States District Court

Waiver of issuance and service of citation on appeal

Filed August 2, 1934

Now comes the plaintiff, Ray Keith Atkinson, by his attorneys of record, John M. Worrell and R. A. D. Morton, and having been furnished a copy of defendant's petition for appeal and assignments of error herein, waives the issuance and service of citation or further notice on appeal in this cause.

JOHN M. WORRELL,
R. A. D. MORTON,
Attorneys for Plaintiff.

In United States District Court

Praecipe for record

Filed August 2, 1934

To the Honorable Clerk of the United States Court for the Western District of Texas:

You will please make up the record in the above cause to
160 be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit, which shall contain the following:

1. Praecipe.
2. Petition for appeal.
3. Assignments of error.
4. Order allowing appeal.
5. Waiver of issuance and service of citation on appeal.
6. Application and order extending time for filing bill of exceptions.
7. Plaintiff's first amended original petition.
8. Defendant's first amended original answer.
9. Defendant's trial amendment.
10. Verdict of the jury.
11. Judgment.
12. Bill of exceptions.
13. Order approving bill of exceptions.
14. Certificate of the clerk.

This the 2nd day of August, A. D. 1934.

WALTER S. HOWE,
Asst. United States Attorney,
DAVID A. TURNER,
Attorney, Department of Justice,
Attorneys for Defendant.

Service of a copy of the foregoing praecipe accepted and receipt of a copy thereof acknowledged this 2nd day of August, A. D. 1934.

JOHN M. WORRELL,
R. A. D. MORTON,
Attorneys for Plaintiff.

(Clerk's certificate to foregoing transcript omitted in printing.)

161a In United States Circuit Court of Appeals for the Fifth Circuit

Minute entry of argument and submission

November 9, 1935

(Title omitted.)

On this day this cause was called, and, after argument by David A. Turner, Esq., Attorney, Department of Justice, for appellant, was submitted to the Court.

162 In United States Circuit Court of Appeals for the Fifth Circuit

No. 7517

UNITED STATES OF AMERICA, APPELLANT

versus

RAY KEITH ATKINSON, APPELLEE

Appeal from the District Court of the United States for the Western District of Texas

Before FOSTER, SIBLEY, and HUTCHESON, Circuit Judges

Opinion of the Court

Filed March 27, 1935

HUTCHESON, Circuit Judge: On April 28, 1934, plaintiff, who had kept all his premiums paid, brought this suit on a policy of Government life insurance No. K 634242, into which on July 1, 1927, he had converted his war-risk insurance policy, and which had, on July 1, 1932, been renewed for five years. He alleged that on January 1, 1928, he became totally and permanently disabled within the meaning both of the general terms of the policy, and of the particular definition of Par. 11, Sec. (2) thereof—"Without prejudice
163 to any other cause of disability * * * the loss of hearing of both ears * * * shall be deemed to be total, permanent disability." A trial to a jury resulted in a verdict and

judgment for plaintiff. This appeal questions the jurisdiction of the court for want of a disagreement, and the correctness of the judgment for errors occurring on the trial.

We need not consider the jurisdictional point, for it passed out of the case with the enactment of January 28, 1935, of Public Resolution No. 1, 74th Congress. We proceed to a discussion of the claimed errors; (1) that the court erred in denying defendant's request for a peremptory instruction; (2) that there was error in withdrawing from the jury the issue of fraud tendered in connection with the plaintiff's application for reinstatement of his war-risk insurance on June 10, 1921; (3) Error in not instructing the jury that in determining whether plaintiff had, under Par. 11, Sec. (a) of his policy, suffered the loss of hearing of both ears, they should consider his possible use of and the effect of his use, of artificial aids to hearing.

The evidence, outside of the documents offered and the medical testimony, consisted of plaintiff's testimony and that of three persons for or with whom he had worked before 1928. Without undertaking to detail it, it is sufficient to say that it was ample to support a verdict that plaintiff was without the aid of ear phones or other similar mechanical devices, to all practical intents and purposes, totally deaf; that the use of such phones greatly helped his hearing, and that but for this impairment of hearing which, in 1928, got so bad he couldn't hold a job, he was a capable and competent draftsman. Plaintiff testified positively, and his testimony was not disputed, that he had been for a long time getting deafer and that since his practically total deafness had come on him he had
164 not been able to get any employment. The employer for whom he last worked stated that though he was otherwise competent, his deafness was such that he had to let him go. The physicians testified that at least since 1932, the date the jury found his total disability occurred, speaking of the use of his ears unaided by devices, he had for all practical purposes, completely lost his hearing. They testified, however, that the use of artificial aids greatly increased his power to hear. There was conflict between them as to the extent to which he was practically aided by them in getting and holding a job. Plaintiff testified positively, and there was no attempt at contradiction, that to use his ear phone effectively for all of a working day would in using up batteries at 75¢ each entail a cost of from $10 to $12 a day, a practically prohibitive cost. That because of this cost he was only able to use the phone intermittently by turning it on when something came up that he particularly wished to hear. With the evidence in that shape, and the Government insisting that Par. 11, Sec. (a) was invalid, and that if valid, it must be construed to mean that one cannot be said to have lost his hearing in both ears if by the use of artificial aids he could hear, the court submitted to the jury whether plaintiff was totally and permanently disabled either under Par. 11, Sec. (a)

from having suffered the loss of hearing of both ears, or under the general provisions of the policy, from being in a condition which permanently disabled him from making his living by work. He told the jury that if they believed that plaintiff had totally lost his hearing, or if they did not believe that, but believed that his condition totally and permanently incapacitated him from making his living by work, they should find for plaintiff. If they believed that neither had occurred, for defendant.

165 In connection with the charge on total and permanent disability under the general clause in the policy, the jury were told that they could consider, in determining whether plaintiff was totally and permanently disabled, the use of, and the effect of the use of, artificial aids to hearing. In connection with the issue whether plaintiff had suffered loss of hearing of both ears, the jury were not so instructed, but on the contrary, defendant's requested charge that they should consider such aids, was refused.

The first point made by appellant, that the definition of total permanent disability of Par. 11, Sec. (a) was inserted in the policy without authority must be overruled. The statute authorizing the Director to issue converted insurance policies U. S. Code, Sec. 512, provides "Not later than July 2, 1926, all term insurance shall be converted * * * into such form or forms of insurance as may be prescribed by regulations and as the insured may request." "Regulations shall provide for the right to convert into ordinary life etc. * * * and into other usual forms of insurance." "Provisions for maturity at certain ages and such other provisions for the protection and advantage of and for alternate benefits to the insured and the beneficiaries as may be found to be reasonable and practical may be provided for in the contract of insurance, or from time to time by regulations."

The policy comes clearly under this authorization. Our case of *Miller* vs. *United States*, 71 Fed. (2) 361, affirmed — U. S. — is without application here. It had to do with a regulation by the Director, made many years after the war risk insurance policy had lapsed, purporting to import into the policy retroactively provisions not in accordance with the statute authorizing the making of the regulations. We find the assailed provisions valid. We think, too, the District Judge was right in construing it to relate to the

166 loss of natural hearing. But if viewed abstractly this was not a correct construction of the clause, as applied to the evidence it was, for by the undisputed proof as to the prohibitive cost to plaintiff of using an ear phone throughout a working day, it is clear that for the purpose of the policy of insurance, plaintiff, whose wages at best were never as much as the cost of the use of the phone, was totally deprived of his hearing. While, therefore, as an aid to comfort and as a luxury, the use of ear phones might be available to him, as an aid to making a living they would be worse than useless, costing him more for their use than he could possibly earn

in a working day. We do not think, then, that there was error in refusing the charge on mechanical aids requested by defendant, or any in refusing the instructed verdict defendant asked. Whether the proof was sufficient to make out a case for the jury also under the general definition of total and permanent disability in the policy, we need not determine, for defendant's motion to instruct was general and we have seen that that request was properly refused. There was no special request to instruct the issue of general total and permanent disability out of the case, separate and apart from the general motion to instruct on the whole case. There was no error of which defendant may complain in submitting that issue to the jury. Nor was it error to withdraw from the jury the tendered issue of fraud in 1921. It is perfectly clear that when plaintiff made his application then for reinstatement, neither he nor anybody else thought or had right to think that his health was other than good. True, his hearing was impaired, but that was disclosed by the doctor's statement as part of the application. There was no concealment whatever, no fraud. Plaintiff was asked if he had been treated for any disease of the ear. It would be natural and proper for one who knew that the physician to whom he had gone in connection with his ear was making out his application and was dis-
167 closing that his hearing was defective, to consider that he had fully answered. An ordinary layman would not suppose that ordinary hardness of hearing was a disease. He was not asked if there was any defect in his hearing. His answers could not in reason be taken to be fraud.

We find no error in the judgment. It is

Affirmed.

168 In United States Circuit Court of Appeals

No. 7517

UNITED STATES OF AMERICA

versus

RAY KEITH ATKINSON

Judgment

March 27, 1935

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

169 In United States Circuit Court of Appeals for the Fifth Circuit

(Title omitted.)

Appellant's Petition for Rehearing

Petition for rehearing

Filed April 15, 1935

170 *To the United States Circuit Court of Appeals for the Fifth Circuit and the judges thereof:*

Comes now the United States of America, the appellant in the above-entitled cause, and presents this, its petition, for a rehearing of this cause, and, in support thereof, respectfully shows that this Court erred in holding that Clause 11 (a) of the policy sued upon is valid:

A. This Court says that the assailed provisions of the policy come clearly under the authorization contained in Section 512, Title 38, U. S. Code. Clause 11 (a) of the policy, if valid, has the effect of enlarging the coverage authorized by law because it converts what is a question of fact requiring proof into a conclusive presumption dispensing with proof and precluding dispute and thus insures the appellee against the loss of hearing of both ears without a determination from the facts in the case whether or not such loss of hearing constitutes total permanent disability. The original Act of October 6, 1917, so far as the same related to insurance (40 Stat. 409–411), provided: in Section 400, for the issuance of insurance against death or total permanent disability; in Section 402, for the determination and publication of the full and exact terms and conditions of the contract, requiring that provisions should be made for maturity, continuous installments, cash, loan, paid-up and extended values, "and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable", such provisions to be placed in the contract of insurance or fixed, from time to time, by regulations; in Section 404, for conversion, not
171 later than five years after the termination of the war, into such form or forms of insurance as may be prescribed by regulations and as the insured may request, such regulations to provide for the right to convert into ordinary life, twenty payment life, and into other usual forms of insurance. Section 402 of the Act of October 6, 1917, related both to War Risk Term insurance and converted insurance. The World War Veterans' Act of June 7, 1924, so far as the same related to insurance (43 Stat. 624–627), provided: in Section 300, for the issuance of insurance against death or total permanent disability; in Section 301, for conversion not later than July 2, 1926, into such form or forms of insurance as might be pre-

scribed by regulations and as the insured might request, containing the same provisions relative to the issuance of regulations governing conversion as were contained in the original War Risk Insurance Act. By the amendment of March 4, 1925 (43 Stat. 1308–1311), Section 300, World War Veterans' Act, was amended to provide for the granting of "United States Government life insurance (converted insurance) against the death or total permanent disability" of members of military and naval establishments, and Section 301 was amended to include certain provisions in the third, fourth, fifth, sixth, and seventh sentences of Section 402, War Risk Insurance Act, approved October 6, 1917, which had apparently been inadvertently omitted from the World War Veterans' Act of June 7, 1924, those provisions referring particularly to the power to issue regulations prescribing the form of converted policies and certain other provisions not material here. The amendments of June 2, 1926 (44 Stat. 686), July 2, 1926 (44 Stat. 798–801), May 29, 1928 (45 Stat. 969–
917), July 3, 1930 (46 Stat. 1001–1002), and June 24,
172 1932 (47 Stat. 334), contained no new material providing a change in the coverage or in the power and limitations of the Director in issuing regulations or including in the contract provisions of the character here assailed, the only addition to the coverage originally prescribed in the Act of October 6, 1917, that was thereafter changed by law being that contained in Section 311 pertaining to insurance against total disability for an additional premium, this section having been first enacted on May 29, 1928 (45 Stat. 970–971). For the convenience of the Court Sections 400, 402, and 404 of the Act of October 6, 1917, Sections 300 and 301 of the World War Veterans' Act of June 7, 1924, Sections 300 and 301, World War Veterans' Act, as amended by the Act of March 4, 1925, are quoted in full in an appendix hereto attached, but the remaining acts herein discussed are not included in the appendix because they contain no applicable provisions.

B. This Court says: "Our case of Miller vs. United States, 71 F. (2d) 361, affirmed ____ U. S. ____ is without application here." It is submitted that the conclusion of the Court in this respect is erroneous as will be disclosed from a study of the various provisions of the Act of October 6, 1917 and the World War Veterans' Act set out in full in the appendix. Examining the Act of October 6, 1917, and more particularly Section 402 thereof, wherein, as to all forms of insurance, whether term insurance or converted insurance, authority was granted for the determination and publication of the full and exact terms and conditions of the contract, for "provisions for maturity at certain ages * * * and such other provisions for
the protection and advantage of and for alternative benefits
173 to the insured and the beneficiaries as may be found to be reasonable and practicable", whether such provisions are placed in the contract itself or fixed by regulations, we submit that, under the holding of the United States Supreme Court in the Miller

case, no one could conclude that the provisions of Regulation 3140, there considered, would have been made valid by inclusion in the original War Risk insurance contract any more than by their publication in the form of a regulation. In this respect, no more, no less, authority was granted as to converted insurance than was conferred as to term insurance by the original Act.

Wherefore, it is respectfully urged that this petition for a rehearing be granted.

Respectfully submitted.

WILLIAM R. SMITH, JR.,
United States Attorney.
WALTER S. HOWE,
Assistant United States Attorney.
WILL G. BEARDSLEE,
Director, Bureau of War Risk Litigation.
WILBUR C. PICKETT,
Special Assistant to the Attorney General.
David A. Turner
By (Signed) DAVID A. TURNER
Attorney, Department of Justice.
" WALTER S. HOWE.

174 *Certificate of counsel*

We, David A. Turner and Walter S. Howe, counsel for the above-named appellant, The United States of America, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

David A. Turner.
(Signed) DAVID A. TURNER,
Attorney, Department of Justice,
(Signed) WALTER S. HOWE,
Asst. U. S. Atty.

Receipt of a copy of the foregoing petition for rehearing acknowledged this 13th day of April, A. D. 1935.

(Signed) JOHN M. WORRELL,
" R. A. D. MORTON,
Attorneys for Appellee.

175 In United States Circuit Court of Appeals

(Title omitted.)

Order denying rehearing

April 20, 1935

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

(Clerk's certificate to foregoing transcript omitted in printing.)

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 39,819. U. S. Circuit Court of Appeals, Fifth Circuit. Term no. 265. The United States of America, Petitioner, vs. Ray Keith Atkinson, Petition for a writ of certiorari and exhibit thereto. Filed July 20, 1935. Term No. 265 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

Supreme Court, U. S.
FILED
JUL 20 1935
CHARLES ELMORE CROPLEY
CLERK

No. 265

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

RAY KEITH ATKINSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM 1935

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

RAY KEITH ATKINSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above entitled case March 27, 1935.

OPINIONS BELOW

The District Court for the Western District of Texas rendered no opinion. The opinion of the Circuit Court of Appeals is reported in 76 F. (2d) 564.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 27, 1935. A petition for re-

hearing was denied April 20, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether there is any authority in law for including in contracts of Government (converted) life insurance against death or total permanent disability, a provision that "the permanent loss of hearing of both ears * * * shall be deemed to be total permanent disability." [1]

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are contained in the Appendix, *infra*, pp. 14–18.

STATEMENT

Ray Keith Atkinson, the respondent, brought this suit in the District Court of the United States for the Western District of Texas to recover total permanent disability benefits under a policy of Government life insurance, together with the premiums paid by him since the date of commencement of the disability alleged.

The plaintiff alleged in his first amended petition, filed May 2, 1934, that on or about July 1, 1927, a war-risk insurance policy in the sum of $10,000

[1] While this question was not specifically raised in the trial court, it formed the basis of the decision of the Circuit Court of Appeals, as indicated at pp. 5–6 *infra*, of the Statement, and consequently may be considered here.

previously issued to him by the defendant was converted upon his application into a certain form of Government life insurance which, on June 1, 1932, was in turn converted into another form of such insurance, and that he has kept the insurance in force at all times by payment of premiums. He further alleged that by reason of loss of hearing in both ears his insurance matured on January 1, 1928, or, at the latest, at some time prior to the filing of his claim for insurance benefits on or about December 10, 1932. His claim of permanent total disability was based, in the alternative, upon two distinct definitions thereof contained in separate clauses in both policies of Government life insurance which had been issued to him, to wit, paragraph 11 which defined total permanent disability as an "impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which graph 11, which defined total permanent disability render it reasonably certain that the total disability will continue throughout the life of the disabled person", and paragraph 11 (a) which provides that "Without prejudice to any other cause of disability, the permanent * * * loss of hearing of both ears * * * shall be deemed to be total permanent disability; * * *." (R. 1–4, 29.)

The defendant's amended answer contained a general demurrer, a special exception on jurisdic-

tional grounds as to a portion of the claim, and a general denial. (R. 6–7.) By leave of court the defendant later filed a trial amendment to its first amended answer, setting up fraud in the reinstatement in June 1921 of the original war risk insurance, which it was alleged had lapsed for nonpayment of premiums upon the plaintiff's discharge from the Army. Fraud was also alleged in the conversion to Government life insurance in May 1927 of the reinstated war risk insurance. (R. 8–10.)

At the trial of the case before a jury evidence was adduced that the plaintiff became, to all practical intents and purposes, totally and permanently deaf without the aid of earphones, between January 1, 1928, and December 10, 1932 (R. 96, 102) but could understand conversation by combining the use of such phones with lip reading (R. 44). It also appeared that he was a college graduate (R. 45), had taught school (R. 46) and was a capable and competent architectural draftsman (R. 46, 54); that he had worked in an architect's office for many years prior to June or July, 1928, at a substantial salary (R. 43) and since then has followed his profession intermittently when work was available, although handicapped by a progressive impairment in his hearing (R. 44-46, 53, 100). Except for this impairment, however, there was no indication that his health was not generally good.

At the close of all the evidence the defendant moved the court to direct a verdict in its favor

upon the following grounds: (1) that there was no substantial evidence (a) of total permanent disability, or (b) of loss of hearing of both ears, within the meaning of paragraph 11 (a) of the policy; (2) fraud (a) in reinstatement of the war risk insurance, and (b) in the conversion of the reinstated insurance to Government life insurance (R. 127–128). The defendant excepted to the denial of this motion (R. 129) and to the rulings of the court on instructions given and requested as to the defense of fraud (R. 130–131, 140), and as to the relevancy *vel non* of the plaintiff's ability to hear with artificial aids (R. 138, 139). The trial court instructed the jury with reference to paragraphs 11 and 11 (a) of the policy, in effect that they should render a verdict for the plaintiff and find that he was totally and permanently disabled if they found that he was either totally and permanently deaf *or* totally and permanently disabled *in fact* (R. 135–137).

The jury rendered a verdict for the plaintiff and found that he "became permanently and totally disabled December 1st, 1932" without indicating whether their finding was based upon permanent total disability in fact or merely upon his deafness without regard to its disabling effect (R. 10). From a judgment entered upon this verdict (R. 11–13) the defendant appealed to the Circuit Court of Appeals for the Fifth Circuit (R. 143–159) assigning error *inter alia* to the court's in-

struction to the jury that recovery might be allowed under clause 11 (a) of the policy which the defendant contended had been placed therein without authority of law (R. 148, 149). The Circuit Court of Appeals affirmed the judgment below on the ground that paragraph 11 (a) of the policy was valid; that the decision of this Court in *Miller* v. *United States,* No. 342, October Term, 1934, decided March 4, 1935, affirming the decision of that Court (71 F. (2d) 361) was inapplicable; and that as the evidence justified a finding that the insured had suffered loss of hearing sufficient to justify recovery under paragraph 11 (a) of the policy [2] it was unnecessary to determine whether there was substantial evidence of permanent total disability in fact within the meaning of the general definition thereof contained in paragraph 11 (R. 29). The court also held that the trial court did not err in withdrawing the issue of fraud from the jury.[2]

SPECIFICATIONS OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in declaring valid the provision in paragraph 11 (a) of the Government life insurance contract that the permanent loss of hearing of both ears shall be deemed to be total disability.

2. The Circuit Court of Appeals erred in holding that the decision of this Court in *Miller* v.

[2] The Government does not question the correctness of the court's decision in these two respects.

United States, No. 342, October Term, 1934, decided March 4, 1935, is without application to this case.

REASONS FOR GRANTING THE WRIT

In *Miller* v. *United States, supra,* this Court held that the provisions with respect to yearly renewable term insurance contained in Article IV of the Act of October 6, 1917 (c. 105, 40 Stat. 398, 409) limited the risk to be covered in respect to total permanent disability to disabilities which are total and permanent in fact, and held invalid, as not within the authority conferred by the statute, Regulation 3140 of the Veterans' Administration, which purported to add to the disability risk by declaring that certain disabilities, including loss of hearing of both ears, shall be deemed to be total and permanent under yearly renewable term insurance without regard to proof of that fact.[3] Although the language in this regulation is identical (except for the addition of another disability)[4] with that in paragraph 11 (a) of the Government life (converted) insurance policy here in suit, and all the statutory provisions construed in that case related to Government life insurance as well as to yearly renewable term insurance, the court below has attempted to distinguish that case from the one at bar on the ground that paragraph 11 (a) was authorized by the gen-

[3] The clause invoked in the *Miller* case was "the permanent loss of the use of * * * one hand and one eye."

[4] Regulation 3140 adds "the organic loss of speech."

eral language in certain provisions of the statute which, it seems to have been assumed, applies to Government life insurance alone. But the soundness of this distinction is by no means clear when this language is construed in the light of its context and of the effect which additions to the disability risk to be covered by this insurance would have upon other purposes manifest in the statute.

The clauses in question appear in U. S. C. Sup. VII, Title 38, sec. 512, and provide:

> * * * not later than July 2, 1927, all term yearly renewable insurance * * * shall be converted, * * * into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, five-year level premium term, and into other usual forms of insurance, * * *.
>
> * * * * *
>
> Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for refund of premiums, cash, loan, paid-up, and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. * * *

Except as to the time limited for conversion of yearly renewable term insurance, the same language appears in the Act of October 6, 1917, and all subsequent legislation on this subject.[5]

This Court has held that general words which follow or precede words descriptive of particular subjects having common characteristics should be construed as limited to subjects of like kind with those described by the particular words unless there is a clear manifestation to the contrary. *United States* v. *Stever,* 222 U. S. 167, 174. Applying this rule to the clauses under construction here, the general phrases, "such form or forms of insurance as may be prescribed by regulations and as the insured may request" and "other usual forms of insurance", should be construed as limited to subjects like those described by the particular phrases "ordinary life, twenty-payment life", etc., which follow and precede them, respectively, and describe several different forms of life insurance.

Similarly, the general clause "such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and prac-

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[5] Acts of June 25, 1918, c. 104, sec. 19, 40 Stat. 609, 615; August 9, 1921, c. 57, sec. 24, 42 Stat. 147, 155; June 7, 1924, c. 320, sec. 301, 43 Stat. 607, 624; March 4, 1925, c. 553, sec. 13, 43 Stat. 1302, 1309; June 2, 1926, c. 449, 44 Stat. 686, 687; May 29, 1928, c. 875, sec. 14, 45 Stat. 964, 968, 969; July 3, 1930, c. 849, sec. 22, 46 Stat. 991, 1001.

ticable" should be construed as limited to subjects like those described by the particular words "maturity at certain ages", "refund of premiums, cash, loan, paid-up, and extended values", etc., which immediately preceded the general clause in the same sentence and all of which describe certain provisions commonly contained in life insurance contracts. This construction is further supported by the fact that the Congress, before passing the Act of October 6, 1917, struck out of the corresponding general clause contained in Section 402 of the bill as originally introduced, a provision authorizing the Director of the Veterans' Bureau to grant "rights and privileges not provided for." (See H. Rep. No. 130, 65th Cong., 1st Sess., part 3, p. 12.)

The reasons stated by this Court for its decision in the *Miller* case apply with equal force to the case at bar. Indeed, there is even less reason for supposing that Congress intended to authorize additions to the disability risk covered by Government life insurance than for imputing such an intent as to yearly renewable term insurance. The premium rate for both was limited to that for the mortality hazard (U. S. C. Sup. VII, Title 38, sec. 511), no increase being authorized to cover the additional risk of disability. But Government life insurance differs from yearly renewable term insurance in that it is intended to be self-sustaining if possible. By Section 18 of the Act of December 24, 1919, c. 16, 41 Stat. 376, Congress established the

United States Government Life Insurance Fund which was to consist exclusively of premiums on such insurance and to be invested and administered separate and apart from funds derived from yearly renewable term insurance.[6]

It was further provided that this fund should be available to meet all liabilities on account of Government life insurance (except "the expenses of administration and the excess mortality and disability cost resulting from the hazards of war" which were borne by the United States (Sec. 403, War Risk Insurance Act, as amended October 6, 1917, c. 105, 40 Stat. 410, U. S. C. Sup. VII, Title 38, sec. 511)), and, to that end, the Bureau was authorized "to set aside out of the fund so collected such reserve funds as may be required, under accepted actuarial principles, to meet all liabilities under such insurance."[7] It was no doubt anticipated that a large part of such liabilities would consist of permanent total disability benefit payments, especially since the contract provided no maximum age limit for those entitled to them. Obviously, the efforts of the Bureau to administer the fund so as to "meet all liabilities" might be seri-

[6] Prior to this Act Government life insurance premiums had been deposited in the military and naval insurance appropriation fund together with those paid for yearly renewable term insurance. (Sec. 20, added to the War Risk Insurance Act by the Act of October 6, 1917, 40 Stat. 400.)

[7] Substantially similar provisions are contained in the statute today. U. S. C., Title 38, Sec. 443.

ously hampered by the assumption of any more gratuitous risks and plain language should therefore be required to justify construing the statute as authorizing such an assumption. There would seem to be no such language contained in the statute.

Even were it assumed that the Director of the Veterans Bureau (or his successor, the Administrator of Veterans Affairs) was authorized to make the total permanent disability provisions in Government life insurance contracts conform to those usually found in commercial insurance policies regardless of the burden thus gratuitously undertaken, there would, nevertheless, seem to be no justification for including a provision making the loss of hearing of both ears presumptive total permanent disability. Such a clause is not only not in general use, but no policy containing it has come to our attention. See Amrhein's *The Liberalization of the Life Insurance Contract,* 1933, pp. 282–283, 361–363 (pars. (8) and (16); and Cf. *The Handy Guide to Standard and Special Contracts,* 1934 (The Spectator Company).

The question of whether or not the presumptive total permanent disability clause in the policy here in suit is valid is, we submit, an important one. Such clauses are contained in all the Government life insurance policies now outstanding[8] which, at

[8] See history of these clauses contained in brief of Veterans' Administration filed in the *Miller* case, pp. 12–21.

the close of the fiscal year 1934, numbered nearly six hundred thousand.[9] Moreover, it may be assumed that many more will be issued from time to time to those entitled to apply for them (U. S. C. Sup. VII, Title 38, secs. 511, 512a). The same provision (with the addition of "the organic loss of speech") is contained in Veterans' Administration Regulation No. 3122, *infra*, p. 17.

In view of the apparent error of the court below, we consider it our duty to seek a review of its decision in order that present and future policy holders may not be misled as to the nature and extent of the disability benefits provided in their contracts.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

JULY 1935.

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[9] Report of Administrator of Veterans' Affairs for 1934, p. 29.

APPENDIX

Statutes and Regulations Involved

Pertinent sections of the War Risk Insurance Act, as amended, provide in part as follows:

> Sec. 13. That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, * * *. (May 20, 1918, c. 77, 40 Stat. 555.)
>
> Sec. 18. That all premiums paid on account of insurance converted under the provisions of Article IV of the War Risk Insurance Act shall be deposited and covered into the Treasury to the credit of the United States Government life insurance fund and shall be available for the payment of losses, dividends, refunds, and other benefits provided for under such insurance. Payments from this fund shall be made upon and in accordance with awards by the director.
>
> The Bureau of War Risk Insurance is hereby authorized to set aside out of the fund so collected such reserve funds as may be required, under accepted actuarial principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby authorized to invest and reinvest the said United States Government life insurance

fund, or any part thereof, in interest-bearing obligations of the United States and to sell the obligations for the purposes of the said fund. (December 24, 1919, c. 16, 41 Stat. 371, 376.)

SEC. 20. That there is hereby appropriated, from any money in the Treasury not otherwise appropriated, the sum of $23,000,000, to be known as the military and naval insurance appropriation. All premiums that may be collected for the insurance provided by the provisions of Article IV shall be deposited and covered into the Treasury to the credit of this appropriation.

Such sum, including all premium payments, is hereby made available for the payment of the liabilities of the United States incurred under contracts of insurance made under the provisions of Article IV. Payments from this appropriation shall be made upon and in accordance with awards by the director (October 6, 1917, c. 105, 40 Stat. 398, 400).

SEC. 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided (October 6, 1917, c. 105, 40 Stat. 398, 409).

SEC. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * * Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. * * * (June 25, 1918, c. 104, sec. 21, 40 Stat. 609, 615.)

SEC. 403. That the United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at three and one-half per centum per annum. (October 6, 1917, c. 105, 40 Stat. 398, 410.)

SEC. 404. That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life,

endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election. (October 6, 1917, c. 105, 40 Stat. 398, 410.)

Veterans' Administration Regulations

Definition of total permanent disability

3121. Total permanent disability as referred to in a United States Government life-insurance policy, is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of total permanent disability and any permium paid after receipt of due proof of total permanent disability and within the six months shall be refunded without interest.

Statutory total permanent disabilities

3122. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or

the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under United States Government life insurance; and monthly installments of insurance for any of these specifically enumerated cases of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

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No. 265

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

RAY KEITH ATKINSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The District Court for the Western District of Texas rendered no opinion. The opinion of the Circuit Court of Appeals (R. 103–106) is reported in 76 F. (2d) 564.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 27, 1935 (R. 106). A petition for rehearing was denied April 20, 1935 (R. 109). The petition for a writ of certiorari was filed July 20, 1935, and granted October 14, 1935 (R. 110).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether there is any authority in law for including in contracts of United States Government life (converted) insurance against death or total permanent disability, a provision that "the permanent loss of hearing of both ears * * * shall be deemed to be total permanent disability."[1]

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are contained in the Appendix, *infra*, pp. 18–24.

STATEMENT

Ray Keith Atkinson, the respondent, brought this suit against the Government in the District Court of the United States for the Western District of Texas to recover total permanent disability benefits under a policy of Government life insurance, together with the premiums paid by him since the date of commencement of the disability alleged.

The plaintiff alleged in his first amended petition (R. 1–4), filed May 2, 1934, that on or about July

[1] While this question was not specifically raised in the trial court, it formed the basis of the decision of the Circuit Court of Appeals, as indicated at p. 6, *infra*, of the Statement, and consequently may be considered here. *Friend* v. *Talcott*, 228 U. S. 27, 36. See also *Wuchter* v. *Pizzutti*, 276 U. S. 13; *Cole* v. *Ralph*, 252 U. S. 286, 290; *Chase, Jr.*, v. *United States*, 256 U. S. 1.

1, 1927, a war-risk insurance policy in the sum of $10,000 previously issued to him by the defendant was converted upon his application into a certain form of Government life insurance which, on June 1, 1932, was renewed and converted into another form of such insurance, and that he has kept the insurance in force at all times by payment of premiums. He further alleged that by reason of loss of hearing in both ears his insurance matured on January 1, 1928, or, at the latest, at some time prior to the filing of his claim for insurance benefits on or about December 10, 1932. His claim of permanent total disability was based, in the alternative upon two distinct definitions thereof contained in separate clauses in both policies of Government life insurance which had been issued to him, to wit, paragraph 11 which defined total permanent disability as an "impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person", and paragraph 11 (a) which provided:

> Without prejudice to any other cause of disability, *the permanent* loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, *or the loss of hearing of both ears,* or becoming

> permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest. (R. 2, 19, 60–61.) (Italics ours.)

The defendant's amended answer contained a general demurrer, a special exception on jurisdictional grounds as to a portion of the claim, and a general denial (R. 4–5). By leave of court the defendant later filed a trial amendment to its first amended answer, setting up fraud in the reinstatement in June 1921, of the original war-risk insurance, which, it was alleged, had lapsed for nonpayment of premiums upon the plaintiff's discharge from the Army. Fraud was also alleged in the conversion to Government life insurance in May 1927, of the reinstated war-risk insurance (R. 5–7).

At the trial of the case before a jury evidence was adduced that the plaintiff became, to all practical intents and purposes, totally and permanently deaf without the aid of ear phones, between January 1, 1928 and December 10, 1932 (R. 62, 65), but could understand conversation by combining the use of such phones with lip reading (R. 30). It also appeared that he was a college graduate, had taught school (R. 30–31), and was a capable

and competent architectural draftsman (R. 31, 36); that he had worked in an architect's office for many years prior to June or July 1928, at a substantial salary (R. 29), and since then has followed his profession intermittently when work was available, although handicapped by a progressive impairment in his hearing (R. 29–31, 35, 64). Except for this impairment, however, there was no indication that his health was not generally good.

At the close of all the evidence the defendant moved the court to direct a verdict in its favor upon the following grounds: (1) that there was no substantial evidence (a) of total permanent disability, within the meaning of paragraph 11 of the policy, or (b) of loss of hearing of both ears, within the meaning of paragraph 11 (a) of the policy; (2) fraud (a) in reinstatement of the war risk insurance, and (b) in the conversion of the reinstated insurance to Government life insurance (R. 81–82). The defendant excepted to the denial of this motion (R. 82) and to the rulings of the court on instructions given and requested as to the defense of fraud (R. 83–84, 89), and as to the relevancy *vel non* of the plaintiff's ability to hear with artificial aids (R. 82–83, 88–89). The trial court instructed the jury, with reference to paragraphs 11 and 11 (a) of the policy, in effect that they should render a verdict for the plaintiff and find that he was totally and permanently disabled if they found that he was either totally and permanently deaf *or* totally and permanently disabled *in fact* (R. 86–87).

The jury rendered a verdict for the plaintiff and found that he "became permanently and totally disabled December 1st, 1932" without indicating whether their finding was based upon permanent total disability in fact or merely upon his deafness without regard to its disabling effect (R. 7). From a judgment entered upon this verdict (R. 7–8) the defendant appealed to the Circuit Court of Appeals for the Fifth Circuit (R. 91–102) assigning error *inter alia* to the court's instruction to the jury that recovery might be allowed under paragraph 11 (a) of the policy which the defendant contended had been placed therein without authority of law (R. 94–95). The Circuit Court of Appeals affirmed the judgment below on the ground that paragraph 11 (a) of the policy was valid; that the decision of this Court in *Miller* v. *United States,* 294 U. S. 435, affirming the decision of that court (71 F. (2d) 361), was inapplicable; and that as the evidence justified a finding that the insured had suffered loss of hearing sufficient to justify recovery under paragraph 11 (a) of the policy,[2] it was unnecessary to determine whether there was substantial evidence of permanent total disability in fact within the meaning of the general definition thereof contained in paragraph 11 (R. 19). The Court also held that the trial court did not err in withdrawing the issue of fraud from the jury.[2]

[2] The Government does not question the correctness of the court's decision as to the sufficiency of the evidence of loss of hearing or as to the trial court's ruling in withdrawing the issue of fraud from the jury.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in declaring valid the provision in paragraph 11 (a) of the Government life insurance contract that the loss of hearing of both ears shall be deemed to be total permanent disability.

2. The Circuit Court of Appeals erred in holding that the decision of this Court in *Miller* v. *United States,* 294 U. S. 435, is without application to this case.

SUMMARY OF ARGUMENT

Petitioner contends that the provision in the contract of Government life insurance against death or total permanent disability that certain forms of physical impairment (including the loss of hearing of both ears) shall be deemed to be total permanent disabilities regardless of whether or not they are such in fact, was not authorized by the statute governing such insurance and is therefore invalid.

The decision of this Court in *Miller* v. *United States, supra,* holding such a provision as to yearly renewable term insurance invalid applies, we submit, with at least equal force to Government life insurance, and the Circuit Court of Appeals erred in holding otherwise.

The general words in the statute on which the court below relies, when read in the light of their context, do not support its attempt to distinguish the *Miller* case.

Furthermore, it is manifest from other statutory provisions relating to Government life insurance

alone that Congress did not intend to authorize the policy provision in question.

Even if the statute could properly be construed as authorizing provisions for the payment of insurance benefits for specific impairments similar to those usually contained in commercial insurance policies, such a construction would nevertheless fail to justify the clause covering the loss of hearing of both ears, since clauses covering this form of impairment have not usually been included in such policies.

The trial court's charge to the jury that recovery might be allowed under the clause in question was prejudicial to the petitioner since it is to be presumed that the jury found its verdict under that clause.

ARGUMENT

In *Miller* v. *United States, supra,* this Court held (pp. 439–440) that the provisions with respect to yearly renewable term insurance contained in Article IV of the Act of October 6, 1917 (c. 105, 40 Stat. 398, 409) limited the risk to be covered in respect to total permanent disability to disabilities which are total and permanent in fact, and held invalid, as not within the authority conferred by the statute, Regulation 3140 of the Veterans' Administration, which purported to add to the disability risk by declaring that certain disabilities, including loss of hearing of both ears, shall be deemed to be

total and permanent under yearly renewable term insurance without regard to proof of that fact.[3] Although the regulation in that case is identical in language (except for the addition of another disability)[4] with paragraph 11 (a)[5] of the Government life (converted) insurance policy here in suit, and although all the statutory provisions construed in that case relate to Government life insurance as well as to yearly renewable term insurance, the court below has attempted to distinguish that case from the one at bar on the ground that paragraph 11 (a) was authorized by the general language in certain provisions of the statute which, it seems to have been assumed, applies to Government life insurance alone. It is submitted that even if the court's assumption were wholly correct, there is no basis for regarding the *Miller* case as distinguishable in principle. When the language in question is examined in the light of its context and of other statutory provisions relating to Government life insurance, it becomes even more evident than in the case of yearly renewable term insurance that Congress did not intend to authorize such additions to the disability risk as those contained in paragraph 11 (a) of the policy in question.

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[3] The clause invoked in the *Miller* case was "the permanent loss of the use of * * * one hand and one eye."

[4] Regulation 3140 added "the organic loss of speech." This clause has also been added to the Government life-insurance contract by Regulation 3122, *infra*, p. 24.

[5] *Supra*, p. 3.

The provisions containing the language relied on by the court below appear in U. S. C., Title 38, sec. 512. They are as follows (the language is represented in italics):

> * * * not later than July 2, 1927, all term yearly renewable insurance * * * shall be converted, * * * into *such form or forms of insurance as may be prescribed by regulations and as the insured may request.* Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, five-year level premium term, and into *other usual forms of insurance,* * * *.
>
> * * * * *
>
> Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for refund of premiums, cash, loan, paid-up and extended values, dividends from gains and savings, and *such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations.* * * * (Italics ours.)

Except as to the time limited for conversion of yearly renewable term insurance, substantially the same provisions appear in Sections 402 and 404 added to the War Risk Insurance Act, 1914, by

the Act of October 6, 1917,[6] and in all subsequent legislation on the subject.[7]

This Court has held that general words which follow or precede words descriptive of particular subjects having common characteristics should be construed as limited to subjects of like kind with those described by the particular words unless there is a clear manifestation to the contrary. *United States* v. *Stever,* 222 U. S. 167, 174; *United States* v. *Salen,* 235 U. S. 237, 249; *Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208; *United States* v. *Chase,* 135 U. S. 255, 258–259; *Neal* v. *Clark,* 95 U. S. 704, 708–709; *United States* v. *Jones,* 131 U. S. 1, 19. Applying this rule to the clauses under construction here, the general phrases, "such form or forms of insurance as may be prescribed by regulations and as the insured may request" and "other usual forms of insurance", should be construed as limited to subjects like those described by the particular phrases "ordinary life, twenty-payment life", etc., which follow and precede them, respectively, and describe several forms of life insurance.

Similarly, the general clause "such other provisions for the protection and advantage of and for

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[6] Appendix, *infra*, pp. 20–21.

[7] Acts of June 25, 1918, c. 104, sec. 21, 40 Stat. 609, 615; August 9, 1921, c. 57, sec. 24, 42 Stat. 147, 155; June 7, 1924, c. 320, sec. 301, 43 Stat. 607, 624; March 4, 1925, c. 553, sec. 13, 43 Stat. 1302, 1309; June 2, 1926, c. 449, 44 Stat. 686, 687; May 29, 1928, c. 875, sec. 14, 45 Stat. 964, 968, 969; July 3, 1930, c. 849, sec. 22, 46 Stat. 991, 1001.

alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable" should be construed as limited to subjects like those described by the particular words "maturity at certain ages", "refund of premiums, cash, loan, paid-up, and extended values", etc., which immediately precede the general clause in the same sentence and all of which describe certain provisions commonly contained in life-insurance contracts. This construction is further supported by the fact that Congress, before passing the Act of October 6, 1917, struck out of the corresponding general clause contained in Section 402 of the bill as originally introduced, a provision authorizing the Director of the Veterans' Bureau to grant from time to time by regulations "rights and privileges not provided for." (See H. Rep. No. 130, 65th Cong., 1st Sess., part 3, p. 12; *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96; *Lapina* v. *Williams*, 232 U. S. 78, 89; *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138, 174 (E. D. Mo.).)

Manifestly, none of the particular matters described in the provisions in question have any relation to the disability risk to be covered by the insurance contract.

Furthermore, there is not any indication elsewhere in the statutes relating to such insurance that Congress intended to authorize the inclusion of the disabilities described in paragraph 11 (a) of

the policy here in suit. The reasons stated by this Court in the *Miller* case for holding similar provisions invalid as to yearly renewable term insurance apply with equal force to Government life insurance. Indeed, there is even less reason for supposing that Congress intended to authorize these additions to the disability risk covered by the latter than for imputing such intent as to the former.

No premiums were charged for covering total permanent disability in either form of insurance, the rate being limited to that for the mortality hazard alone,[8] except in the case of Government life insurance policies containing provisions for the payment of separate benefits in the event of total disability for a minimum period of time without regard to permanence, in which case an additional premium was charged.[9] Government life insurance differs, however, from yearly renewable term insurance in that it is intended to be self-sustaining if possible. By Section 18 of the Act of December 24, 1919, c. 16, 41 Stat. 376,[10] Congress established the United States Government Life Insurance Fund which was to consist exclusively of premiums on

[8] Section 403 added to the War Risk Insurance Act by the Act of October 6, 1917, c. 105, 40 Stat. 398, 410 (Appendix, *infra*, p. 20.

[9] Section 311 added to the World War Veterans' Act, 1924, by the Act of May 29, 1928, c. 875, sec. 16, 45 Stat. 964, 970–971, as amended July 3, 1930, c. 849, sec. 25, 46 Stat. 991, 1002 (Appendix, *infra*, pp. 21–28.)

[10] Appendix, *infra*, p. 19.

such insurance and to be invested and administered separate and apart from funds derived from yearly renewable term insurance.[11]

It was further provided that this fund should be available to meet all liabilities on account of Government life insurance (except "the expenses of administration and the excess mortality and disability cost resulting from the hazards of war", which were borne by the United States),[12] and, to that end, the Bureau was authorized "to set aside out of the fund so collected such reserve funds as may be required, under accepted actuarial principles, to meet all liabilities under such insurance."[13] It was no doubt anticipated that a large part of such liabilities would consist of permanent total disability benefit payments, especially since the con-

[11] Prior to this Act no provision was made for the deposit of Government life insurance premiums in any fund separate from those derived from yearly renewable term insurance, which were required to be deposited in the military and naval insurance appropriation fund. (Sec. 20, added to the War Risk Insurance Act by the Act of October 6, 1917, c. 105, 40 Stat. 398, 400 (Appendix, *infra*, p. 18).)

[12] Section 403, added to the War Risk Insurance Act by the Act of October 6, 1917, c. 105, 40 Stat. 398, 410 (Appendix, *infra*, p. 20). Section 302 of the World War Veterans' Act (June 7, 1924, c. 320, 43 Stat. 607, 625) added liability for benefits payable for total permanent disability or death "traceable to the extra hazard of the military or naval service" to the costs to be borne by the Government.

[13] Substantially similar provisions are contained in the statute today. U. S. C., Title 38, Sec. 443.

tract provided no maximum age limit for those entitled to them. Obviously, the efforts of the Bureau to administer the fund so as to "meet all liabilities" might be seriously hampered by the assumption of any more gratuitous risks. The purpose of Congress not to authorize such additions without an increase of premium is shown by the fact that it required an additional premium for the added risk assumed under policies containing provisions for the payment of separate benefits in the event of total disability for a minimum period.[14]

Thus it is evident that the interpretation by the court below of the general clauses in the statute invoked by it conflicts not only with a well settled rule of construction but also with the manifest purpose of Congress to avoid, if possible, all costs to the Government in connection with Government life insurance except those specified in the statute.[15]

However, even were it assumed that the Director of the Veterans Bureau (or his successor, the Administrator of Veterans' Affairs) was authorized to make the total permanent disability provisions in Government life insurance contracts conform to those usually found in commercial insurance policies regardless of the burden thus undertaken, there would, nevertheless, seem to be no justification for including a provision making the loss of

[14] Note 9, *supra*, p. 13.
[15] Note 12, *supra*, p. 14.

hearing of both ears a conclusively presumptive total permanent disability. Such a clause is not only not in general use, but no policy containing it has come to our attention. See Amrhein's *The Liberalization of the Life Insurance Contract,* 1933, pp. 282–283, 361–363 (pars. (8) and (16)); and compare *The Handy Guide to Standard and Special Contracts,* 1934 (The Spectator Company).

In short, it is submitted that the provision in paragraph 11 (a) of respondent's policy which presumes total permanent disability from the loss of hearing of both ears regardless of the fact, is without authority in law and invalid, and the court below erred in holding otherwise. Furthermore, the trial court's charge to the jury that they might allow a recovery under that provision was prejudicial to the defendant since it is to be presumed that the verdict was found under it in the absence of anything in the record to the contrary. *Yazoo & M. V. R. R. Co.* v. *Mullins,* 249 U. S. 531, 533; *Fillippon* v. *Albion Vein Slate Co.,* 250 U. S. 76, 82.

Even if the trial court's charge had not been prejudicial, it appears by the undisputed facts set out in the Statement, *supra,* pp. 4–5, that the evidence would not have justified a verdict for the plaintiff founded upon total permanent disability *in fact.* Cf. *Miller* v. *United States,* 294 U. S. 435, 440–442, *supra.*

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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W. MARVIN SMITH,
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DECEMBER 1935.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Pertinent sections of the War Risk Insurance Act, as amended, provide in part as follows:

> SEC. 13. That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, * * * [October 6, 1917, c. 105, sec. 2, 40 Stat. 398, 399.]
>
> SEC. 20. That there is hereby appropriated, from any money in the Treasury not otherwise appropriated, the sum of $23,000,000, to be known as the military and naval insurance appropriation. All premiums that may be collected for the insurance provided by the provisions of Article IV shall be deposited and covered into the Treasury to the credit of this appropriation.
>
> Such sum, including all premium payments, is hereby made available for the payment of the liabilities of the United States incurred under contracts of insurance made under the provisions of Article IV. Payments from this appropriation shall be made upon and in accordance with awards by the director. [October 6, 1917, c. 105, sec. 2, 40 Stat. 398, 400.]

SEC. 18. That all premiums paid on account of insurance converted under the provisions of Article IV of the War Risk Insurance Act shall be deposited and covered into the Treasury to the credit of the United States Government life insurance fund and shall be available for the payment of losses, dividends, refunds, and other benefits provided for under such insurance. Payments from this fund shall be made upon and in accordance with awards by the director.

The Bureau of War Risk Insurance is hereby authorized to set aside out of the fund so collected such reserve funds as may be required, under accepted actuarial principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby authorized to invest and reinvest the said United States Government life insurance fund, or any part thereof, in interest-bearing obligations of the United States and to sell the obligations for the purposes of the said fund. [December 24, 1919, c. 16, 41 Stat. 371, 376.]

SEC. 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided. [October 6, 1917, c. 105, sec. 2, 40 Stat. 398, 409.]

SEC. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * * Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. * * * [October 6, 1917, c. 105, sec. 2, 40 Stat. 398, 409.]

SEC. 403. That the United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at three and one-half per centum per annum. [October 6, 1917, c. 105, sec. 2, 40 Stat. 398, 410.]

SEC. 404. That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two and

into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election. [October 6, 1917, c. 105, sec. 2, 40 Stat. 398, 410.]

Section 311 of the World War Veterans' Act, 1924, as amended, provides as follows:

SEC. 311. The director is hereby authorized and directed to include in United States Government life (converted) insurance policies provision whereby an insured, who is totally disabled as a result of disease or injury for a period of four consecutive months or more before attaining the age of sixty-five years and before default in payment of any premium, shall be paid disability benefits at the rate of $5.75 monthly for each $1,000 of converted insurance in force when total disability benefits become payable. The amount of such monthly payment under the provisions of this section shall not be reduced because of payment of permanent and total disability benefits under the United States Government life (converted) insurance policy. Such payments shall be effective as of the first day of the fifth consecutive month, and shall be made monthly during the continuance of such total disability. Such payments shall be concurrent with or independent of permanent total disability benefits under the United States Government life (converted) insurance policy. In addition to the monthly disability benefits the payment of premiums on the United States Government life (converted) insur-

ance policy and for the total disability benefits authorized by this section shall be waived during the continuance of such total disability. Regulations shall provide for reexaminations of beneficiaries under this section; and, in the event that it is found that an insured is no longer totally disabled, the waiver of premiums and payment of benefits shall cease and the United States Government life (converted) insurance policy, including the total disability provision authorized by this section, may be continued by payment of premiums as provided in said policy and the total disability provision authorized by this section. Neither the dividends nor the amount payable in any settlement under any United States Government life (converted) insurance policy shall be decreased because of disability benefits granted under the provisions of this section. The payment of total disability benefits shall not prejudice the right of any insured, who is totally and permanently disabled, to total permanent disability benefits under his United States Government life (converted) insurance policy: *Provided, That the provision authorized by this section shall not be included in any United States Government life (converted) insurance policy heretofore or hereafter issued, except upon application, payment of premium by the insured,* and proof of good health satisfactory to the director. The benefit granted under this section shall be on the basis of multiples of $500, and not less than $1,000 or more than the amount of United States Government life (converted) insurance in force at time of application. *The director shall determine the amount of the monthly premium to cover the benefits of this section,* and in order to continue such benefits in force the monthly premiums shall

be payable until the insured attains the age of sixty-five years or until the prior maturity of the policy. In all other respects such monthly premium shall be payable under the same terms and conditions as the regular monthly premium on the United States Government life (converted) insurance policy. [May 29, 1928, c. 875, sec. 16, 45 Stat. 964, 970; July 3, 1930, c. 849, sec. 25, 46 Stat. 991, 1002 (U. S. C., Title 38, sec. 512 b).] (Italics ours.)

VETERANS' ADMINISTRATION REGULATIONS

DEFINITION OF TOTAL PERMANENT DISABILITY

3121. Total permanent disability as referred to in a United States Government life-insurance policy, is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of total permanent disability and any premium paid after receipt of due proof of total permanent disability and within the six months shall be refunded without interest.

STATUTORY TOTAL PERMANENT DISABILITIES

3122. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one

eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under United States Government life insurance; and monthly installments of insurance for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest. [Promulgated March 1930.]

U. S. GOVERNMENT PRINTING OFFICE: 1938

FILE COPY

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No. 265

In the Supreme Court

OF THE

United States

October Term, 1935

UNITED STATES OF AMERICA,
Petitioner,

vs.

RAY KEITH ATKINSON,
Respondent.

OPPOSING BRIEF ON BEHALF OF RESPONDENT

THORNTON HARDIE,
JOHN M. WORRELL,
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El Paso, Texas,
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In the Supreme Court

OF THE

United States

October Term, 1935

UNITED STATES OF AMERICA,
Petitioner,

vs.

RAY KEITH ATKINSON,
Respondent.

No. 265

OPPOSING BRIEF ON BEHALF OF RESPONDENT

To the Honorable Supreme Court of the United States:

The question presented, the statutes and regulations involved, and the statement of the case are all fairly set forth in the petition, though it should be stated that there was no special request by the Government to instruct the issue of total and permanent disability in fact out of the case, and such character of disability, as well as that based on paragraph 11-a was submitted to the jury in the charge (R. 131) and the verdict was general, not specifying which character of disability was found. (R. 10.)

ANSWER TO SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals was correct in holding as valid the provision in paragraph 11-a of the contract providing that the permanent loss of hearing of both ears shall constitute total and permanent disability.

2. The Circuit Court of Appeals was correct in holding that the decision in Miller vs. U. S., ... U. S. ....., 79 L. Ed. 478, affirming 71 Fed. (2d) 361, has no application to this case.

ARGUMENT

We submit, in the first place, that petitioner is not in position to ask a reversal of the courts below on the question presented in the petition because in the opinion of the Circuit Court of Appeals it is said:

> "Whether the proof was sufficient to make out a case for the jury also under the general definition of total and permanent disability in the policy, we need not determine, for defendant's motion to instruct was general and we have seen that that request was properly refused. There was no special request to instruct the issue of general total and permanent disability out of the case, separate and apart from the general motion to instruct on the whole case. There was no error of which defendant may complain in submitting that issue to the jury."

In view of the above holding we submit that the question presented as to the validity of Paragraph 11, Section A, of the policy is academic and moot because, it having been held that the trial court properly sub-

mitted to the jury the question of total and permanent disability in fact as well as under Paragraph 11-a, and that in doing so there was no error of which the petitioner might complain, we submit that since the verdict of the jury was general it should be held in accordance with the established rules that the verdict will be attributable to and upheld on any theory or state of facts warranted under the evidence, and, there being substantial evidence that respondent was totally and permanently disabled in fact, the verdict should not be disturbed.

Not waiving the above insistence, we submit further that paragraph 11-a is valid and that the Miller case is not applicable.

The provisions of law relating to term insurance have not been carried into U. S. Code, but started with the Act of October 6th, 1917, Chapter 105, Section 2, 40 Stat. 409, and 514 U. S. Comp. Stat. 1918. It will be seen that said Act provided that the Government "shall grant insurance against the death or total permanent disability of any such person," and limited the time within which it could be applied for, and with reference to the authority of the Director provided, "The Director subject to the general direction of the Secretary of the Treasury shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance."

38 U. S. Code Sections 511, 512, 512-A and 512-B relate to converted insurance, and among other things provide that within a specified period all term insurance shall be converted without medical examination

into such form or forms of insurance as may be prescribed by regulations and as the insured may request, and also they provide it shall contain "such other provisions for the protection and advantage of, and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable."

38 U. S. Code, Section 426, prescribes the duties of the Director, and among other things, provides: "All official acts performed by such officials or employees specially designated therefor by the Director shall have the same force and effect as though performed by the Director in person."

38 U. S. Code Sections 11 and 11-E, which created the Veterans' Administration, substituted the "Administrator" for the "Director" and vested him with the same powers and continued in force all rules and regulations formerly in existence.

The regulations of the Director have the force of law.

Sawyer vs. United States, 10 Fed. (2nd) 416 (C. C. A. 2);

Baker vs. United States, 24 Fed. (2nd) 766 (C. C. A. 5);

United States vs. Lawson, 50 Fed. (2nd) 646 (C. C. A. 9).

Under the clause from Section 512 above quoted, we submit that clause A of paragraph 11 of the policy (R. 29) is entirely reasonable and practicable and similar to those generally found in insurance policies. It is unnecessary to cite cases to sustain this statement because the reports are full of cases containing similar

clauses providing that the loss of certain faculties or members shall be considered total and permanent disability.

In this connection, it is also important to notice that Section 512-B provides that the Director must include a provision that one who is *only* totally disabled for a period of four consecutive months shall be paid total permanent benefits, though it provides that on recovery the payments shall cease. This shows that Congress intended that Government Converted Insurance should be in line with company insurance because such four months presumptive clauses are now generally contained in insurance policies.

38 U. S. Code, Section 512 (Sup.) is the section relating to conversion and provides:

> "for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for refund of premiums, cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations."

It also provides:

> "That no deduction shall be made for continuous installments during the life of the insured in case his total and permanent disability continues for more than 240 months."

We think it clear from the above quoted provision that it was the intention of Congress that the converted insurance should cover total and permanent

disability and also that power was vested in the Director by regulation to provide for all the things mentioned.

It was clearly within the province of the Director to define total and permanent disability.

In Lumbra vs. United States, 290 U. S. 551, 78 L. Ed. 492, the Director's regulation defining general total and permanent disability was under discussion and the authority of the Director was recognized, though it was said that the definition was not an exact one or the sole guide by which such disability is to be construed.

We submit that it was just as valid for the Director to make the additional regulation contained in paragraph 11-a of the policy to the effect that total loss of hearing in both ears should constitute such disability, because under the facts of this case, as shown from the record and the opinion of the Circuit Court of Appeals, respondent is for all practical purposes totally and permanently disabled, and we submit that it is a matter of common knowledge that the average man in respondent's condition with respect to the sense of hearing is for all practical purposes totally and permanently disabled in fact. The cases on disability by reason of loss of hearing are few, but we refer to

McCutchen vs. Pacific Mutual Life Insurance Co. (S. C.), 151 S. E. 67;

Kane vs. Metropolitan Life Insurance Co. (Mo.), 73 S. W. (2d) 826.

In view of the recognition given in the Lumbra case, supra, to the definition of the Director, it would seem that the Government's complaint here is merely that the Director erred in exereising his discretion and power of definition by including loss of hearing as a total permanent disability. Since there is no claim that the Director abused his discretion or power, we believe the matter is not open to the attack made, which amounts really to a question of the exercise of a power given rather than presenting a question of lack of power to exercise such discretion.

Furthermore, since the issuance of the contract containing paragraph 11-a, Congress has passed various amendments to the Act but has not said that said paragraph is wrong nor prohibited it and under the well established rule of practical construction by a Department of the Government, we submit that paragraph 11-a should be upheld on this theory, if on none other.

The Government says that it has found no policy containing the clause making loss of hearing presumptive total permanent disability. However, we believe the court will know that in the insurance field it is almost a universal custom to provide in disability policies that the loss of certain members or senses shall constitute total permanent disability, and this is true also of numerous workmen's compensation laws, and we submit that there is no real reason for excluding loss of hearing from such clauses in policies and that the Director, acting on the authority given him to prescribe the terms of the policy and to include provisions

therein which are "reasonable and practicable," was clearly acting properly in including loss of hearing in the clause.

As to the Miller case, supra, we think it sufficient to point out that in that case it was sought to apply a regulation of the Director as to war risk term insurance retroactively for a period of eleven years and it was held that this could not be done as the power of the Director, if construed as contended for by the veteran in that case, would amount to legislation rather than regulation. And we, therefore, think that case is not applicable here. We believe that Congress has drawn a distinction between the powers of the Director to promulgate regulations with reference to term insurance as distinguished from converted insurance, and that since the regulation in question is reasonable, it should be sustained.

We respectfully submit that the writ should not be granted.

WHEREFORE, respondent prays that the writ be denied or, if it be granted, that the decisions of the courts below be affirmed, and he prays for general relief.

Respectfully submitted,

THORNTON HARDIE,
JOHN M. WORRELL,
R. A. D. MORTON,
Attorneys for Respondent.

FILE COPY

No. 265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA,
Petitioner,

VS.

RAY KEITH ATKINSON,
Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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No. 263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA,
Petitioner,

VS.

RAY KEITH ATKINSON,
Respondent.

BRIEF FOR RESPONDENT

TO THE HONORABLE SUPREME COURT:

QUESTION PRESENTED

The real question (if properly presented here) is, whether under the several statutes applicable, paragraph 11 (a) of Government Converted Insurance, providing that

> "permanent loss of hearing of both ears * * * * shall be deemed to be total permanent disability,"

is valid.

STATEMENT OF THE CASE

The statement of the case as made by petitioner is correct insofar as it goes, but it is desired to supplement same by adding the following:

Your respondent cannot hear conversation without the ear

phone. He can read lips to some extent, but cannot carry on an intelligent conversation by lip reading alone. The only way he understands talk is a combination between catching the sound by the ear phone and seeing the word spoken by the lips. The ear phone is operated by a battery and if he were required to work eight hours a day using his ear phone he would require about sixteen batteries a day, which cost seventy-five cents each (R 30). The requested charges made by the defendant on the trial speak for themselves and appear in the record (R 81-83).

There was no intimation even of a request to instruct the issue of total and permanent disability in fact out of the case, and further there was no intimation whatever of any attack on the validity of Section 11 (a) in the requested charges, or otherwise in the trial court.

In fact the Government admits in a note at page 2 of its brief that the question it presents here was not raised in the trial court.

The trial court (R-88) instructed in effect that the jury should consider whether even with the use of the ear phone plaintiff was able to secure and retain employment.

ARGUMENT

A. The Question sought to be presented is not properly before the Court.

Under the statements made by petitioner and respondent it will appear that no question was made as to the validity of Paragraph 11 (a) of the Policy in the trial court, but that an attack thereon was first made on the appeal. The Court instructed the jury as to total and permanent disability in fact, as well as on Paragraph 11 (a), and the verdict was:

> "We, the jury find for the plaintiff, that he became totally and permanently disabled December 1st, 1932." (R-7).

In this situation we submit that the question sought to be

presented not having been raised in the trial court, that all the courts below should be affirmed as the verdict should be attributable in any event to and upheld on any state of facts warranted under the evidence, and there being substantial evidence that plaintiff was totally and permanently disabled in fact, the verdict should not be disturbed.

That proceedings below are presumed correct, see:

Fairmount Glass Works vs Cub Fork Coal Co, 287 U. S. 474: 77 L. Ed. 439;

Mercantile Trust Co. vs Hensey, 205 U. S. at 306: 51 L. Ed. 814.

That a point not presented on the trial and sought to be presented here as an after-thought will not be considered, see:

Southern Pine Lumber Co vs Ward, 208 U. S. 126: 52 L. Ed. 420;

Robinson vs Belt, 187 U. S. 50: 47 L. Ed. 69;

Minnich vs Gardner, 292 U. S. 48: 78 L. Ed. 1116.

Also the dissent in the Wuchter Case, 276 U. S. 13, cited by the petitioner.

B. Paragraph 11 (a) of the policy is valid.

The Act of October 6th, 1917, amending the War Risk Insurance Act was the beginning of this Government insurance and contains Sections 402 and 404, and except as to the time limit for conversion of the insurance, these sections have been re-enacted time and time again without substantial change, so far as any question here is concerned. (See Note 7, p. 11, Petitioner's Brief). All these Acts provided that the Government

> "shall grant insurance against the death or total permanent disability of any such person."

And it was provided that the Director,

> "shall promptly determine upon and publish the full and exact terms and condition of such contract of insurance."

Later it appears from 38 U. S. C. (Supp), Sections 11 and 11-e (b), Act of July 3, 1930, 46 Stat. 1016-1018, that the Administrator was substituted for the Director, and continued

in force all rules and regulations formerly in existence.

38 U. S. C. Sections 511, 512, 512-a, and 512-b relate to converted insurance and, among other things, provide that within a specified period all term insurance shall be converted without medical examination,

> "into such form or forms of insurance as may be prescribed by regulations and as the insured may request."

And also provides:

> "Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for refund of premiums, cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations."

It also provides:

> "That no deduction shall be made for continuous installments during the life of the insured in case his total and permanent disability continues for more than 240 months."

Section 513 in part provides that when a person receiving total permanent benefits under converted insurance

> "recovers from such disability,"

that he may still continue his insurance in force under certain conditions.

Section 512-b directs the Director to include in converted insurance a provision whereby if insured is totally disabled for twelve months (four months, as amended in Act of July 3rd, 1930,) he shall be paid benefits at the same rate as if totally and permanently disabled under the conditions there stated. It is true it provides for additional premium for such benefits, but the reason therefor is clear because the law only provides for insurance for total and permanent disability or death, whereas the additional benefits under 512-b are clearly not within the law as it theretofore existed.

None of the statutes, or re-enactments thereof, as to con-

verted insurance define total and permanent disability, but under the statutes referred to we think it clear that Congress intended that converted insurance should cover total and permanent disability and that power was vested in the Director by regulation to provide for such disability and to define it. It was not only within the province of the Director to define the character of disability dealt with by the law, but in view of the lack of definition in the law, it would appear that it was imperative that the Director exercise the power of definition. We say this because, as above shown, the Act says

> the policy must provide, "for continuous installments during the life of the insured."

Certainly some limitation in the way of regulation or definition was necessary on this broad provision. Furthermore, it was contemplated by the Act, Section 513, above mentioned, that one thought to be totally and permanently disabled might recover, and hence that phrase was not used in its absolute sense, again showing a necessity for a definition.

Again, the Act, Section 443, provides that the Bureau shall

> "act on accepted actuarial principles to meet all liabilities under such insurance."

And we submit that this, considered with other provisions of the Act mentioned, evinces an intention on the part of Congress to give the Director wide latitude in prescribing the kinds, terms and conditions of such insurance, so as to be in line with company insurance, and the reports contain many cases containing clauses providing that the loss of certain faculties or members shall be considered total and permanent disability, as well as that if total disability continues for short specified periods such shall likewise be considered total and permanent so far as benefits are concerned.

Paragraph 11 (a) of the policy merely follows this practice and though respondent says that no policy has been found containing a clause relating to hearing, we do know that policies do contain such presumptive clauses as to other mem-

bers and since one in respondent's condition with respect to the sense of hearing is for all practical purposes so far as getting and holding a job is concerned totally and permanently disabled in fact, we therefore, submit that the paragraph is

"a reasonable and practicable"

provision and within the discretion of the Director to make.

In Lumbra vs U. S., 290 U. S. 551: 78 L. Ed. 492, the regulation defining general total and permanent disability was under discussion and while it was pointed out that the definition given was not an exact one or the sole guide by which such disability is to be determined, still the authority of the Director in the matter was recognized.

It would seem that the Government's complaint here is really that the Director has erred in exercising his power of definition by including loss of hearing; and since there is no claim that the Director abused his power, we believe the matter is not open to the attack made, which in fact amounts to a question of the exercise of the power given, rather than presenting a question of lack of power to exercise such discretion.

Respondent, from the entire record, is clearly in a state of total and permanent disability for all practical purposes because one in his condition as a practical matter would have great difficulty in getting a job, and greater difficulty in holding it, even if he could afford the expense of $10.00 or $12.00 per day of operating the ear phone, and without that, the record is undisputed that he could not hear, and even with that, he cannot hear but very imperfectly.

Cases of disability by reason of loss of hearing are not numerous, but we refer to:

McCutcheon vs Pacific Mutual Life Insurance Co, (S. C.) 151 S. E. 67;

Kane vs Metropolitan (Mo.) 73 S. W. (2d) 826.

On the whole, we submit that paragraph 11 (a) is a reasonable and practicable provision and that its provisions are

within the intent and purpose of the law, and within the power of the Director to prescribe the terms of the insurance, and hence is valid.

Furthermore under 38 U. S. C. (Supp), Section 11e (b) being Act of July 3rd, 1930, 46 Stat. 1018, which is the Act authorizing consolidation of former Veteran functions into the Veterans Administration, it is provided:

> "All orders, rules, regulations, and permits or other privileges, issued or granted in respect of any function consolidated under the provisions of this Act and in effect at the time of the consolidation, shall continue in effect to the same extent as if such consolidation had not occurred, until modified, superseded, or repealed by the Administrator."

Since the policy in suit, with Paragraph A therein had been issued prior to this Act, and since there is no claim that Paragraph A has ever been modified or superseded by the Administrator, it would seem that the above Act would be sufficient to amount to an express adoption of said paragraph.

We, therefore, submit that the paragraph in question is valid.

C. Repeated re-enactment of the Statute relating to converted insurance, without change therein insofar as total and permanent disability is concerned, amounts to legislative consent to the policy issued by the Director.

Since the inception of congressional action relating to this insurance by the Act of October 6th, 1917, the provisions appearing in Sections 402 and 404 of that Act have been substantially re-enacted (except as to the time specified for conversion) on many occasions, as appears from the list of the Acts, Note 7, page 11, Petitioner's Brief; and those sections (being now 38 U. S. Code, Section 512) not having been changed except as to conversion date, and the converted insurance policy having at all times contained Paragraph 11 (a), it is submitted that Congress has in any event given its consent to such paragraph, even if it should be held that

originally it was not within the province of the Director.

The petitioner in its petition for certiorari, pp. 12-13, says that such clauses are contained in all Government life insurance policies now outstanding which, at the close of the fiscal year 1934, numbered nearly six hundred thousand.

The question, therefore, is one of great importance, not only to respondent, but to the other six hundred thousand who have paid premiums for their policies and acquired what they undoubtedly thought were valid rights thereunder.

In Studebaker vs Perry, 184 U. S., at 269: 46 L. Ed. at 533, a case in which the doctrine now invoked was not found applicable, it was said:

> "but its application should be restricted to cases in which the construction involved is really one of doubt and where those to be affected have relied on the practical construction, and rights have accrued by reason of such reliance."

In Mass. M. L. Ins. Co. vs U. S., 288 U. S. at 272, 77 L. Ed. at 742, it is said:

> "If the legislative body had considered the Treasury interpretation erroneous it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute (cases cited) unless, perhaps, the language of the act is unambiguous and the regulation clearly inconsistent with it." (Cases cited.)

In Norwegian Nitrogen Prod. Co. vs U. S., 288 U. S. at 313: 77 L. Ed. at 806, it is said:

> "Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years."

In National Lead Co. vs U. S., 252 U. S. at 146, 64 L. Ed. at 499, with reference to a statute re-enacted four times, it is said that such,

> "amounts to an implied legislative recognition and approval of the executive construction of the Statute."

Similar holdings are found in:

Murphy Oil Co vs Burnett, 287 U. S. at 302: 77 L. Ed. at 322;
Old Colony R. C. vs Commission, 284 U. S. at 557: 76 L. Ed. at 487;
Federal Land Bank vs Warren, 292 U. S. at 55: 78 L. Ed. at 1121;
Burnett vs Thompson Oil & Gas Co, 283 U. S. at 307: 75 L. Ed. at 1054;
Brewster vs Gage, 280 U. S. at 337: 74 L. Ed. at 463;
U. S. vs Farrar, 281 U. S. at 634: 74 L. Ed. at 1081;
U. S. vs Jackson, 280 U. S. at 197: 74 L. Ed. at 368.

The policy in suit, containing paragraph 11 (a), is dated June 13th, 1927 (R. 15-24) and respondent has regularly paid all premiums thereon and according to the Government's statement in the petition for certiorari, p. 12, all outstanding Government life insurance policies contain said paragraph and number nearly six hundred thousand, and there is continuing authority to issue others in U. S. C., Title 38, Sec. 512-a.

The law from its inception has provided for the insurance,

"against the death or total permanent disability,"

as it now appears in Section 511, Title 38, U. S. C. And the provisions respecting the character and terms of the insurance have been practically identical since the inception of this insurance and, as now appears in Section 512, Title 38, U. S. C., though on a number of occasions that section has been re-enacted to change the time limit for conversion of the insurance.

Congress evidently was cognizant of the terms and conditions of the insurance, as by Section 512-b, Title 38, U. S. C., it provided for the addition of a presumptive total disability clause when one had been disabled for only four months, but in connection with that legislation did not take any action with respect to the existing policy which evidently had been issued and used in its present form since insurance was first authorized and issued. And the law has been re-enacted in practically identical words, both before the issuance of re-

spondent's policy, as well as afterwards, but Congress, evidently knowing of the form of the policy, or if not, being charged with notice thereof, has not seen fit to say that paragraph 11 (a) is wrong nor prohibited it.

We submit that since nearly six hundred thousand have acquired rights under the policy as drawn, containing paragraph 11 (a), and since it is a reasonable and practicable provision, similar to that found in numerous company policies, and since it has been acquiesced in by Congress for so long a period, that in any event under the doctrine now urged the policy should be upheld as valid.

D. The Miller Case, 294 U. S. 435, is not applicable.

The real point decided in the Miller Case, 294 U. S. 435: 79 L. Ed....., was that it was not permissible for the assured under Government term insurance to derive benefit from and have applied a regulation of the Director adopted eleven years after the policy there involved had lapsed. Furthermore, in that case the policy did not contain the presumptive clause, but the benefit of a regulation made eleven years after the policy lapsed was sought to be applied, whereas in our case the policy itself contains the presumptive clause, which according to the Government has been in all such policies of converted insurance.

In the Miller case there could have been no approval of the regulation on the doctrine of practical executive construction because the regulation involved there was issued in May, 1930, and the claim was made in June, 1931, therein, and suit was brought in April, 1932. Whereas in our case the doctrine is available because the clause is certainly not prohibited by the law and has been in use for many years, under which the rights of some six hundred thousand have been acquired, and by its re-enactment of the law Congress is presumed to have acquiesced in the clause, if in fact it was not within the province of the Director to make. And as to this we insist

that since Congress has throughout drawn a distinction between term insurance and converted insurance, that it was within the power of the Director to adopt the clause in question, which is both reasonable and practicable.

We, therefore, respectfully submit that the judgments below should be affirmed.

WHEREFORE, respondent prays that the judgment of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

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December, 1935.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 265

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

RAY KEITH ATKINSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

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SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

Statement.

From a jury verdict finding respondent permanently and totally disabled from December 1, 1932 (R. 7), because of the permanent loss of hearing of both ears while his contract of United States Government (converted) Insurance was in full force and effect, petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit (R. 91-102)

assigning as error the following instruction (R. 94-95) of the trial court (italics supplied):

> "VIII. The court erred in instructing the jury as follows:
>
> 'And in Clause (a) of said Paragraph 11 of the policy, as relating to total and permanent disability, it is provided as follows: 'Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, *or the loss of hearing of both ears,* or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.' '
>
> 'Therefore, gentlemen of the jury, you are instructed by the Court as a matter of law that, by the terms and provisions of said life insurance policy issued by the defendant, United States of America, to the plaintiff, Ray Keith Atkinson, it is provided that in the event the insured, the plaintiff herein, sustained loss of the hearing of both ears, the same constitutes total and permanent disability under the terms and provisions of said War Risk Insurance Policy'."

The Circuit Court of Appeals affirmed the judgment below, holding that the provisions of Paragraph 11(a) of the contract sued upon was valid, coming within the authority conferred by law and that the decision of this Court in the *Miller* v. *United States,* 294 U. S. 435, affirming the decision of the Fifth Circuit Court of Appeals in that case (71 F. (2d) 361), was inapplicable.

Questions Presented.

1. The United States, in the instant case, contends that there is no authority in law for including in contracts of United States Government Life (converted) Insurance against total permanent disability, the following clause contained in said contracts:

> "the permanent loss of hearing of both ears * * * shall be deemed to be total permanent disability."

2. The United States, in the instant case, contends that the action taken by the District Court and the United States Circuit Court of Appeals for the Fifth Circuit was contrary to the decision of this Court in *Miller* v. *United States,* 294 U. S. 435.

Summary of Argument.

1. PETITIONER'S ATTEMPT TO ESCAPE LIABILITY UPON THE GROUND THAT THERE WAS NO AUTHORITY OF LAW FOR INCLUDING IN CONTRACTS OF UNITED STATES GOVERNMENT LIFE (CONVERTED) INSURANCE AGAINST TOTAL AND PERMANENT DISABILITY THE PROVISION SET FORTH IN THE CONTRACT HEREIN SUED UPON THAT "THE PERMANENT LOSS OF HEARING OF BOTH EARS * * * SHALL BE DEEMED TO BE TOTAL AND PERMANENT DISABILITY" IS UNTENABLE BECAUSE—

(a) THE STATUTE, REGULATIONS, AND THE LEGISLATIVE APPROVAL BY SUBSEQUENT ENACTMENTS OF LAW BY THE NATIONAL CONGRESS CLEARLY SHOWS THAT THIS CLAUSE IS VALID AND BINDING UPON THE RESPONDENT.

(b) PETITIONER IS ATTEMPTING TO "CONTEST" THE INSURANCE CONTRACT SUED UPON WHICH IS SPECIFICALLY FORBIDDEN BY LAW AND THE EXPRESS PROVISIONS OF SAID CONTRACT, AND SUCH ACTION ALSO VIOLATES THE 5TH AMENDMENT TO THE CONSTITUTION.

2. THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE DECISION OF THIS COURT IN THE CASE OF *Miller* v. *United States*, 294 U. S. 435, WAS NOT APPLICABLE TO THIS CASE.

ARGUMENT.

(a) The statute, regulations, and the legislative approval by subsequent enactments of law by the National Congress clearly shows that this clause is valid and binding upon the respondent.

Respondent (and some six hundred thousand other citizens up to the close of the fiscal year 1934) obtained from the United States and paid premiums upon contracts of United States Government Life (converted) Insurance[1] containing clauses similar to that which the United States is attacking in this suit[2]. Premiums are being paid today upon hundreds of thousands of these contracts by World War Veterans for the protection covered by the express terms thereof, including the protection which the United States in the present suit seeks to renounce and avoid liability upon by declaring this provision of its solemn written contract to be a nullity.

The contract herein sued upon provides (R. 19-20) (italics supplied):

> "Total permanent disability.—11. Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon condi-

---

[1] Report of Administrator of Veterans' Affairs for 1934, p. 29.

[2] See history of these clauses contained in brief of Veterans' Administration filed in this Court in the case of *Miller* v. *United States* (No. 342 October Term, 1934) pp. 12-21.

tions which render it reasonably certain that the total disability will continue throughout the life of the disabled person.. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of such total permanent disability, and any premiums paid after receipt of due proof of total permanent disability, and within the six months shall be refunded without interest.

(a) Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, *or the loss of hearing of both ears,* or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.''

The foregoing provision in this contract is based upon Section 3122 of the Regulations of the United States Veterans' Administration duly issued by the Administrator of Veterans' Affairs, which provides:

''3122. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or of the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under United States Government life insurance; and monthly installments of insurance for any of these specifically enumerated cases of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.''

The authority for the foregoing provisions of the insurance contract and the above quoted Regulation is found in Title 38, U. S. C. A., Paragraph 512, which provides (italics supplied):

> "Not later than July 2, 1926, all term insurance shall be converted * * * into such forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, five-year level premium term, and into other usual forms of insurance, * * * in accordance with regulations to be issued by the director, * * * Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for refund of premiums, cash, loan, paid up and extended values, dividends from gains and savings, *and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations.*

The Circuit Court of Appeals (R. 105), like the District Court, held the provisions of the insurance contract sued upon now contested by the Government comes clearly within the foregoing authorization. I respectfully submit it does.

The insurance which was the subject of congressional legislation from 1914 until 1933 was a contract created and existing between the insurer and the insured with respect to the "coverage" or subject matter of the insurance contract. "Total permanent disability" had a fairly well defined and understood meaning not only by reason of general use of the term but also because of judicial construction thereof in sundry cases decided prior to the World War. As a general rule and particularly if the insured is suffering from some affliction within the body, the term is more or less flexible. Certain conditions, however, so generally incapac-

itate those suffering therefrom that reasonable men did not and do not differ on the question of whether such conditions in fact produce "total permanent disability." If it should be conceded that occasionally some very exceptional person, with exceptional mental endowment and exceptional economic opportunity, may possibly produce some income notwithstanding he is totally blind or has lost both legs or one arm and one eye, or has suffered some of the other afflictions indicated in the specific loss provisions of the contract, nevertheless we are dealing with a *practical* and not a theoretical or abstract problem. Congress in express terms gave the person charged with the administration of the War Risk Insurance Act authority to make—

> "*such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time in the regulations.*" (Title 38, U. S. C. A., Paragraph 512.)

It will thus be seen that Congress intended for these contracts to be practicable or practical as well as reasonable; and it is submitted that this "specific loss" provision which the Government is now attacking is both reasonable and practical.

Further, even though the contract itself did not include the so called "specific loss" provision, as it does, the administrative officials could properly adjudicate claims upon the standards indicated by the regulations.

Some standard for the guidance of the subordinates actually doing the rating was and is indispensable. In the last analysis the enumeration of these specific losses, so called, is nothing more nor less than laying down a rule of measurement found by experience to be substantially accurate. That it is incorporated in the contract, in the Regulations

or in certain internal instructions or general orders, is a detail of no importance so far as the principle involved is concerned.

The World War Veterans' Act approved June 7, 1924 (Public No. 242—68th Congress, 43 Stat. 607, 38 U. S. C. A. 193, *et seq.*), provided in Section 301 that all term insurance shall be converted not later than July 3, 1927 into such—

> *"form or forms of insurance as may be prescribed by regulations and as the insured may request."*

It is apparent, therefore, that there is ample statutory authority for the issuance of Section 3122 of the Regulations, United States Veterans' Administration, which prescribes certain "provisions for the protection and advantage of and for alternative benefits to the insured. * * *" 38 U. S. C. A., Paragraph 512.

As was said by this Court in the case of *Wilbur National Bank* v. *United States* in decision rendered February 4, 1935, 79 L. Ed. 402 at page 405:

> "The statutes and regulations which govern the War Risk Insurance Bureau we must assume are known to those who deal with it."

As was said by this Court in the case of *Lynch* v. *United States*, 292 U. S. 571 (78 L. Ed. 1434, at page 1439)—

> *"In order to promote efficiency in administration and justice in the distribution of War Risk Insurance benefits, the Administration was given power to prescribe the form of policies and to make regulations. The form prescribed provided that the policy should be subject to all amendments to the original Act, to all regulations then in force or thereafter adopted."*

The regulations issued by the Director are a part of the contract of insurance under the expressed terms thereof (*White* v. *U. S.*, 270 U. S. 175, 70 L. Ed. 530) and these regu-

lations which are a part of the contract are as binding on the Government as they are upon the veteran. *Lynch* v. *U. S., supra.* The clause in question here was printed on the face of the contract sued on, and was there when the contract was issued to Atkinson, who paid his premiums on the faith of it. So did several hundred thousand others pay their money on the faith of the contract offered them.

Many of the six hundred thousand citizens carrying insurance policies of this character cannot now procure insurance in private corporations because, relying upon the provisions of their government contracts, being no longer insurable risks, they could not now obtain other insurance. It is respectfully submitted that if petitioner's contention is the law of this case, many citizens who have been paying premiums on their contracts for the past fifteen years or more in the confidence which they have had in the promise of their Government will suffer. No private insurance company could possibly hope to repudiate a portion of its contract, as the Government is here attempting. Such attempt, therefore, should not be allowed to succeed unless the law clearly and imperatively requires that result. It clearly does not require, and I insist, does not permit such a dishonest result.

I respectfully submit that, under the settled rule of law, continued administrative interpretations of statutes will be respected and enforced. For the past several years the administrative interpretation has been that the regulations, and provisions of the contract which the Government is now attempting to avoid, have been recognized as valid. This interpretation it is respectfully submitted was correct.

But even if it were believed that the construction of the various statutes by the several officials primarily charged with the duty of construing and administering them over a period of years was erroneous, such construction having

been uniformly given by these various administrative officials and having been applied in hundreds of thousands of cases and incorporated in over half a million contracts now outstanding and in force, it is well settled law that such construction will be adhered to and adopted by the Court, as has been held in many cases. A few citations will suffice.

In the case of *Hahn* v. *United States,* 107 U. S. 402, the Appellant sought to recover a share in certain fines and forfeitures accruing at the Port of New York and his right thereto turned primarily upon the proper construction of a statute enacted in 1867. Under the construction thereof which had been adopted and followed by the Treasury Department, he was not entitled to participate in such fines, etc. This Court approved the reasoning and conclusions of the Court of Claims which emphasized the fact that Congress

> "had not interfrered with such constructions by the Secretary of the Treasury while the Act was in force."

This was in accord with the case of *United States* v. *Pugh,* 99 U. S. 265, wherein this Court in the course of its opinion observed—

> "In the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect, is entitled to great respect."

In *United States* v. *The Alabama Great Southern Railroad Company,* 142 U. S. 615, the controversy involved the proper construction of a statute relating to concession in the price for transporting mails where the carrier had received land grants from the Government. The Post Office Department had construed the statute in a certain manner, which construction was followed from 1876 to 1886 by three

Postmasters General. Then a new Postmaster General sought to change the construction and this Court denied his right so to do and held in favor of the carrier. In the course of the opinion (page 621), it is said (italics supplied):

> "We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that Department; a construction which though inconsistent with the literalism of the Act, certainly consorts with the equities of the case, should be considered as decisive in this suit. It is a settled doctrine of this Court that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be *ACTED UPON FOR A NUMBER OF YEARS*, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. * * *"

In *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361 (at 401), this Court clearly indicated that notwithstanding the fact that it might disagree with the construction of the statute in certain particulars, nevertheless, since the rulings had been made by such Commission during "the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the 'Act to Regulate Commerce' is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future; * * * We make this concession because we think we are constrained to so do, in consequence of the familiar rule that a construction made

by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, AND HAS BEEN IMPLIEDLY SANCTIONED BY THE REENACTMENT OF THE STATUTE WITHOUT ALTERATION IN THE PARTICULARS CONSTRUED, when not plainly erroneous, must be treated as read into the statute" (page 402).

In *National Lead Company* v. *United States*, 252 U. S. 140, this Court again recognized the binding effect of the administrative construction of a statute extending over a substantial period of time.

Section 13 of the Act of October 6, 1917 (Public No. 90—65th Congress) 40 Stat. 398 provided that the director of the Bureau of War Risk Insurance under the general direction of the Secretary of the Treasury should "administer, execute, and enforce the provisions of this Act and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this Act necessary OR APPROPRIATE to carry out its PURPOSES, and shall decide all questions arising under the Act, * * *. The director shall adopt reasonable and proper rules to govern the procedure * * * to regulate and provide for the *nature and extent of the proofs and evidence* and the method of taking and furnishing the same in order to establish the right to * * * INSURANCE provided for in this act, * * * and the manner and form of adjudications and awards." (40 Stat. 399.) With some changes in verbiage this is still the law.

Pursuant to such authority the administrative officers did determine the detailed terms of the contracts and among other things provided that any of the enumerated specific losses should constitute a loss insured against by the contract.

Although Congress has legislated on the subject frequently during the past fourteen years, there has been no statute indicating any dissatisfaction of the Congress with

the terms of said contracts so promulgated by the Administrator pursuant to the directions contained in the statutes. There has been no narrowing of the language quoted in any of the thousands of contracts of insurance subsequently issued. Hundreds of claims have been asserted under such contracts, and undoubtedly many are being paid pursuant to administrative determination or in accordance with judgments obtained in the Courts for the "specific losses" set forth in these contracts. These veterans, some of whom were wounded in hostilities have been paid benefits in good faith by the proper administrative officials. If the Government's contention prevails in this case undoubtedly efforts will be made to collect from these seriously disabled veterans the sums heretofore paid them over a period of years pursuant to adjudications by the administrative officials of the Government causing gross injustice and mischievous results.

Congress has legislated time and again upon this subject without disturbing or changing in any way this long continued administrative construction. I respectfully submit that by reason of the legislative history of this matter, Congress, many members of which are World War veterans and undoubtedly hold similar contracts, has approved and adopted and in effect directly authorized the language in dispute with reference to this "specific loss" provision.

Public No. 47, 67th Congress approved August 9, 1921 (42 Stat. 147), created the Veterans' Bureau transferring the duties conferred by the law then being administered by the Bureau of War Risk Insurance to the Veterans' Bureau (42 Stat. 148). Section 404 of this Act relating to the conversion of the term insurance theretofore written *"into such form or forms of insurance as may be prescribed by regulations and as the insured may request."* That was long after the administrative practice in question was well established and it is respectfully submitted that Congress

by this Act expressly approved the existing practice, the "specific loss" provision having become a part of the contract and this approval by Congress had the effect of extending legislative sanction thereto.

Section 300 of the World War Veterans' Act approved June 7, 1924 (Public No. 242—68th Congress, 43 Stat. 607, 38 U. S. Code 193 *et seq.*) relates to insurance and is in substantially the same language as the prior acts, so far as this question is concerned.

Section 301 provides that all term insurance shall be converted not later than July 2, 1927, into such "*form or forms of insurance as may be prescribed by regulations and as the insured may request.*"

Public No. 448 of the 69th Congress, approved July 2, 1926 (44 Stat. 790), amended the World War Veterans' Act in several respects but Section 300 in which is described the disability insured against uses the same words as used throughout viz: "total permanent disability."

Again Congress approved the practice which had been in existence for years and it must be borne in mind that the World War Veterans' Act of 1924 followed extensive hearings and investigations on the entire subject of veterans' relief and veterans' insurance and that Act in effect was a codification of what Congress deemed appropriate after a complete overhauling of all existing legislation on the subject of World War veterans. This is significant, and negatives the thought that there may have been any oversight by the Congress in connection with the present subject.

(b) Petitioner is attempting to "contest" the insurance contract sued upon which is specifically forbidden by law and the express provisions of said contract, and such action also violates the 5th Amendment of the Constitution.

The insurance contract provided that respondent's disabilities were totally and permanently disabling. Peti-

tioner's attack upon the specific provision of contract, it is respectfully submitted, amounts to a "contest" of this contract, which is precluded by statute.

Section 307 of the World War Veterans' Act, as amended by Section 24 of Public 522, approved July 3, 1930 (46 Stat. 991) provides:

> "All contracts or policies of insurance HERETOFORE OR HEREAFTER issued, reinstated, or converted, SHALL BE INCONTESTABLE FROM THE DATE OF ISSUANCE, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces * * * this section shall be deemed to be effective as of April 6, 1917, and APPLICABLE FROM THAT DATE to ALL contracts or policies of insurance."

Formerly Section 307 provided that the insurance should be incontestable "after the insurance *has been in force six months* from the date of issuance or reinstatement * * *," and also that a letter mailed by the Bureau should constitute a contest. This latter provision undoubtedly was incorporated to meet the decision of this Court in *Hurni Packing Company* v. *Mutual Life Insurance Company*, 263 U. S. 167; 68 L. Ed. 235. It was therein held that the contest must be initiated within the period provided in the policy, notwithstanding that death occurred prior to the expiration of such period. But said provision for a letter of contest was eliminated when Section 307 was amended in 1930, as indicated above.

As far as I can discover there is only one decision in the United States directly in point presumably because the conclusion therein indicated is so manifestly correct that counsel for private insurance companies never thought it worthwhile to litigate the question. I refer to *Mutual Reserve Fund Life Association* v. *Austin*, decided by the Circuit Court of Appeals for the First Circuit in December,

1905, 142 Fed. 398. Suit was brought to recover the face amount of a life insurance contract which contained this provision:

> "If this policy of insurance shall have been in continuous force for three years from its date, it shall thereafter be incontestable except for nonpayment of premiums * * * or for misstatement of the age * * *."

It also contained a provision as follows:

> "This contract shall not take effect until this policy is delivered to the member in person during his lifetime and while in good health, nor until the first payment is paid in cash hereon while said member is also in good health."

The undisputed facts in that case showed that the deceased insured was not in good health at the time the contract was delivered to him. He died more than three years after the date thereof. Judgment for plaintiff was affirmed. The Court said (page 401):

> "The term incontestable is of great breadth. It is the policy which is to be incontestable. We think the language broad enough to cover all grounds for contest not specially excepted in that clause. * * * The word policy may well be taken to mean a formal document delivered by the company and containing evidence of an obligation to pay * * *."

It will be observed that Section 307 above provides that "all contracts or policies of insurance * * * shall be incontestable from the date of issuance." Formerly in the 1924 Act the language read: "shall be incontestable after the insurance *has been in force six months* from the date of issuance * * *," practically the same language as in the Austin case cited.

This change in the language in 1930 indicates an intention by the Congress to liberalize the incontestable pro-

vision so as to make it more desirable to the insured. It also is further evidence of Congressional approval of the then existing terms of the insurance "contracts or policies" which had long been in existence pursuant to the administrative officers' determination thereof.

In the case of *Northwestern Mutual Life Insurance Company* v. *Johnson,* 254 U. S. 96, 65 L. Ed. 155, this Court affirmed a judgment for the plaintiff, beneficiary under two life insurance policies. Payment was contested on the ground that the insured committed suicide. The language most favorable to the insurer was:

> "If within two years from the date hereof the said insured shall * * * die by his own hand * * * this policy shall be void."

The other policy provided:

> "This contract shall be incontestable after one year from the date of its issuance provided the required premiums are duly paid."

After pointing out that the case of *Ritter* v. *Insurance Company,* 169 U. S. 139, had been modified by the decision in *Whitefield* v. *Insurance Company,* 205 U. S. 489, this Court, answering a certified question, held the insurer was liable under both contracts. The insured committed suicide at a date more than two years after the first policy and more than one year after the second policy was issued. The Court said:

> "The object of the clause is plain and laudable—to create an absolute assurance of the benefit as free as may be from any dispute of fact except the fact of death and as soon as it can reasonably be done."

It further held that the two quoted clauses were the same in effect and that each policy was incontestable after the period stated therein.

It seems clear that under the express terms of the statutes cited providing that these policies should be incontestable from their dates that it is not now open to the insurer (the United States) to contest the validity of the specific loss provisions thereof. And it will be noted that the incontestable section of the statute is expressly made effective as of April 6, 1917.

This contract constituted property rights. Rights against the United States arising out of contracts with it are protected by the Fifth Amendment to our Constitution.

(*Lynch* v. *U. S.*, 292 U. S. 578, 78 L. Ed. 1444, and cases cited therein.)

When the United States enters into contract relations its rights and duties therein are governed generally by the law applicable to contracts between private individuals. (*Lynch* v. *U. S., supra.*)

As Congress had the power to authorize the Bureau of War Risk Insurance to issue these contracts, the due process clause prohibits the United States from annulling same. As was said by this Court in the case of *Lynch* v. *United States, supra:*

> "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors * * * the United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state or a municipality or a citizen." (Citing Sinking Fund cases, 99 U. S. 700, 719, 25 L. Ed. 496, 501).

2. THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE DECISION OF THIS COURT IN THE CASE OF *Miller* v. *United States,* 294 U. S. 435, WAS NOT APPLICABLE TO THIS CASE.

The statutory basis for the provision "the permanent loss of hearing of both ears * * * shall be deemed to be total permanent disability" is different in this case from the statutory authority relied on in the *Miller* case for the issuance of a regulation making the provision of the statute relating to compensation applicable to insurance, and retroactively effective. In the *Miller* case, involving yearly renewable war risk term insurance the only statutory basis was that contained in Public No. 522, 71st Congress approved July 3, 1930 (46 Stat. 991) amending Section 5 of the Act of June 7, 1924 and reading—

> "The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and SHALL DECIDE ALL QUESTIONS arising under this Act; and all DECISIONS OF QUESTION OF FACT AND LAW affecting any claimant to the benefits of Titles II, III, or IV SHALL BE CONCLUSIVE except as otherwise provided herein. * * *"

In the instant case, involving United States Government Life (converted) Insurance on a legal reserve self-sustaining basis, the statutory authority for issuing this policy with the "specific loss" provision referred to above, as pointed out by the Circuit Court of Appeals in the instant case (R. 105) was Section 512, U. S. Code Annotated providing—

> **"Not later than July 2, 1926, all term insurance shall be converted * * * into such form or forms of insurance as may be prescribed by regulations and as the insured may request." "Regulations shall provide for the right to convert into ordinary life, etc. * * * and into other usual forms of insurance." "Provisions**

> **for maturity at certain ages and such other provisions for the protection and advantage of and for alternate benefits to the insured and the beneficiaries as may be found to be reasonable and practical may be provided for in the contract of insurance, or from time to time by regulations."**

A comparison of these two statutory provisions, relating to *different* kinds of insurance, will disclose that the statute relating to the regulation referred to in the *Miller* case, *supra,* was a *general* statute; while here the regulation and the policy were issued under a statute specifically referring to and providing for the promulgation of terms of United States Government Life (converted) Insurance only. Also, in the instant case the contract sued on was made *subsequent* to the statutory enactment and issuance of the regulations, and *the contract, containing on its face the specific loss provision, matured after it had been in force for a considerable period of time, with payment of premiums during such period.*

This Court in the *Miller* case was not called upon to and did not in any way consider the above quoted statute, which is applicable only to United States Government Life (converted) Insurance.

The regulation in the *Miller* case was not adopted until eleven years after the insurance policy sued upon had elapsed (or matured) and Miller's cause of action thereon had fully matured, if any he had. There was no longer a contract, but a chose in action in the *Miller* case. This Court is not called upon here to deal with such a situation. Atkinson's *contract contains the language under attack.* He bought it and paid for it with that language in it—one of the "terms and conditions" placed in it by the official designated so to do by the statute.

The insurance contract sued on in the instant case is legal reserve life (and disability) insurance and the premiums paid are deposited in a self-supporting mutual fund in the Treasury, which fund is invested and reinvested in interest bearing obligations. Dividends resulting from this interest and from mortality savings are and have been regularly paid to its policy holders. The following statement by years shows the annual, and the accumulated amount of dividends paid to dates indicated after setting aside the reserve required according to accepted actuarial principles to provide for losses[3].

December 31.	Dividends paid during year indicated.	Accumulated amount dividends paid to date indicated.
1920-21	$ 993,706.92	$ 993,706.92
1923	1,631,103.46	2,624,810.38
1923	2,056,213.06	4,681,023.44
1924	2,585,215.87	7,266,239.31
1925	2,795,372.73	10,061,612.04
1926	3,086,678.49	13,148,290.53
1927	3,846,772.86	16,995,063.39
1928	5,958,383.94	22,953,447.33
1929	6,033,216.41	28,986,663.74
1930	6,903,625.19	35,890,288.93
1931	7,738,296.83	43,628,585.76
1932	7,270,066.72	50,898,652.48
1933	3,420,603.09	54,319,255.57
1934	5,944,589.52	60,263,845.09
1935 (11 Mo.)	5,865,033.01	66,128,878.10

[3]See letter from Frank T. Hines, Administrator of Veterans' Affairs, to Watson B. Miller, Director, National Rehabilitation Committee, The American Legion, dated January 6, 1936, regarding dividends paid on United States Government Life Insurance set forth verbatim in the appendix hereto.

Conclusion.

For the reasons and upon the authorities stated on pages two and three of Respondent's original brief in this Court it is believed Petitioner is precluded from having reviewed the question it presents. But if the question is open to review in this Court the conclusion necessarily must be that: (1) there was legal authority for including in plaintiff's contract of United States Government Life (converted) Insurance against total permanent disability the clause; "* * * the permanent loss of hearing of both ears * * * shall be deemed to be total and permanent disability"; (2) the judgment below in this case is not in conflict with the decision of this Court in the case of *Miller* v. *United States*, 294 U. S. 435; (3) aside from the right to recover on the so called specific loss provision of his contract (the validity of which was not contested in the trial court), the record reflects evidence sufficient to support the verdict and judgment for respondent. The judgment should be affirmed.

WARREN E. MILLER,
Southern Building,
Washington, D. C.,
Counsel for Respondent.

A. H. CULWELL,
JOHN M. WORRELL,
R. A. D. MORTON,
El Paso, Texas.

APPENDIX.

VETERANS ADMINISTRATION, WASHINGTON.

Office of the Administrator of Veterans Affairs

January 6, 1936.

Captain Watson B. Miller,
Director of Rehabilitation,
American Legion,
1608 K Street, N. W.,
Washington, D. C.

MY DEAR CAPTAIN MILLER:

This is in response to your request to be advised the amount paid as dividends on United States Government Life Insurance Policies.

According to the records of the Finance Service of the Veterans' Administration, the amounts paid as dividends on such policies by calendar years (eleven months in 1935 to November 30) and cumulatively to November 30, 1935, are as follows:

December 31.	Dividends paid during year indicated.	Accumulated amount dividends paid to date indicated.
1920-21	$ 993,706.92	$ 993,706.92
1922	1,631,103.46	2,624,810.38
1923	2,056,213.06	4,681,023.44
1924	2,585,215.87	7,266,239.31
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1931	7,738.296.83	43,628,585.76
1932	7,270,066.72	50,898,652.48
1933	3,420,603.09	54,319,255.57
1934	5,944,589.52	60,263,845.09
1935 (11 Mo.)	5,865,033.01	66,128,878.10

Very truly yours,

FRANK T. HINES,
Administrator.

SUPREME COURT OF THE UNITED STATES.

No. 265.—October Term, 1935.

The United State of America, Petitioner, *vs.* Ray Keith Atkinson.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 3, 1936.]

Mr. Justice Stone delivered the opinion of the Court.

This case was brought here on certiorari, — U. S. —, to review a determination of the Court of Appeals for the Fifth Circuit, said to be inconsistent with our decision in *Miller* v. *United States*, 294 U. S. 435. The challenged holding is that there is statutory authority for including in contracts of United States government insurance (converted war risk insurance) covering death or total permanent disability a provision that "the permanent loss of hearing of both ears . . . shall be deemed to be total disability." The case was tried in the district court to a jury which rendered a verdict for the plaintiff, respondent here. Judgment in his favor was affirmed by the Circuit Court of Appeals for the Fifth Circuit, 76 F. (2d) 564, which held that the insertion in the policy of the quoted definition of total disability, pursuant to Veterans' Administration Regulation, § 3122, was authorized by 43 Stat. 624, 1309, 38 U. S. C., § 512.[1]

The government, by its assignment of errors here, assails, as it did in the court below, the correctness of this ruling, but examination of the record discloses that no such objection was presented to the trial court. In consequence the government is precluded from raising the question on appeal.

[1] "§ 512. Not later than July 2, 1926, all term insurance held by persons who were in the military service after April 6, 1917, shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, and into other usual forms of insurance, . . . Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. . . ."

The trial judge instructed the jury that respondent might recover either on the theory that his loss of hearing constituted in fact a permanent disability preventing his pursuit of any substantially gainful occupation, or that his loss of hearing of both ears, if permanent, was a permanent disability as defined by the policy. The jury was thus left free to return a verdict for respondent if it found that he had suffered permanent loss of hearing of both ears, regardless of its effect upon his ability to earn his livelihood. The government failed to question the correctness of these instructions either by exception or request to charge, and its motion for a directed verdict was upon other grounds not now material.

The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. *Beaver* v. *Taylor*, 93 U. S. 46; *Allis* v. *United States*, 155 U. S. 117, 122, 123; *United States* v. *United States Fidelity & Guaranty Co.*, 236 U. S. 512, 529; *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334, 348; *Pennsylvania Railroad Co.* v. *Minds*, 250 U. S. 368, 375; *Burns* v. *United States*, 274 U. S. 328, 336; see *Shannon* v. *Shaffer Oil & Refining Co.*, 51 F. (2d) 878, 880. It is substantially that adopted by Rule 10, Subdivision 1, of the rules of the Court of Appeals for the Fifth Circuit, which requires the party excepting to the charge "to state distinctly the several matters of law" to which he excepts, and directs that "those matters of law, and those only, shall be inserted in the bill of exceptions."

In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. See *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310, 318; *Brasfield* v. *United States*, 272 U. S. 448, 450. But no such case is presented here. The judgment must be affirmed for the reason that the error assigned was not made the subject of appropriate exception or request to charge upon the trial.

Affirmed.